No. 11-4257

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JEFFREY A. WIEST, ET AL.,

Plaintiffs-Appellants,

v.

THOMAS J. LYNCH, ET AL.,

Defendants-Appellees

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case No. 2:10-CV-03288-GP

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE OF THE JUDGMENT BELOW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae the Chamber of Commerce of the United States of America states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members are employers subject to the "whistleblower" provision of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley," "SOX," or "the Act"), 18 U.S.C. § 1514A. For the past century, the Chamber has played a key role in advocating on behalf of its membership. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases raising issues of vital concern to the nation's business community, including cases construing Sarbanes-Oxley.

The Chamber's members have a strong interest in the fair and efficient enforcement of the Sarbanes-Oxley whistleblower provision to accomplish its essential goals and in the speedy dismissal of claims not within the scope of protected activity under the Act. Meritless claims and expanding litigation costs have a direct impact on the viability, growth, and survival of businesses nationwide. In light of the large number of Sarbanes-Oxley whistleblower complaints, it is especially important that, if this Court were to reach the merits, it affirm the district court's decision dismissing the Complaint for failure to state a

claim and affirm the district court's decision denying reconsideration. Absent clear guidance on the scope of protected activity, the remedial goals of the Sarbanes-Oxley whistleblower provision may be thwarted, and the provision may be misused to second guess an employer's sound business reasons for separating or otherwise disciplining an employee in circumstances unrelated to activity protected under the Act. The circumstances of this case demonstrate that concern: Wiest has attempted to use the claim that he is a SOX "whistleblower" to thwart a company investigation of misconduct on his part.[1]

SUMMARY OF ARGUMENT

The whistleblower provision of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley," "SOX," or "the Act") creates a private right of action for employees of publicly-traded companies who are retaliated against for disclosing information about defined categories of potentially unlawful conduct. 18 U.S.C. § 1514A. To plead a SOX whistleblower claim, an employee must allege that: (1) he engaged in protected activity; (2) the employer knew of the protected activity; (3) he suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the

[1] All parties have consented to the filing of this brief. Fed. R. App. P. 29(a). Pursuant to Fed. R. App. P. 29(c)(5), amicus hereby certifies that this brief was authored by amicus and counsel listed on the front cover. No party or party's counsel authored this brief, in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No other person but amicus, its members, and its counsel contributed money that was intended to fund preparing or submitting this brief.

protected activity was a contributing factor to the unfavorable action. The district court correctly dismissed the Complaint and denied reconsideration because Plaintiffs-Appellants failed to plead that Wiest engaged in protected activity.

As a Manager in Accounts Payable, Wiest was charged with ensuring corporate expenses were properly documented and recorded. *While in his role as an accountant*, Wiest asked questions regarding the company's treatment of certain expenses and required additional documentation or authorization before processing certain transactions. The district court carefully analyzed the language of each email and concluded that he *never* reported any concerns about alleged SOX violations. *See* App. 0015-34 (*Wiest, et al. v. Lynch, et al*., Memorandum Decision, Case No. 2:10-cv-03288-GP (July 21, 2011) ("July Mem. Dec.")); App. 0004-13 (*Wiest, et al. v. Lynch, et al*., Memorandum Decision, Case No. 2:10-cv-03288-GP (Nov. 15, 2011) ("Nov. Mem. Dec.")). He simply made inquiries regarding the treatment of certain expenses and insisted on compliance with Tyco's internal approval process as he was required to do as part of his job.

For example, Wiest contends that the "*most flagrant covered activity*" occurred when he declined to process a payment and sent a note to superiors questioning the legitimacy of an event in the Bahamas. App. 0043 (Compl. ¶ 34 (citing Exhibit E)) (emphasis added). As the district court correctly noted, that communication simply stated that certain costs had to be "reviewed and

addressed"—"perhaps by the relevant tax department"—in order to be sure all costs were "recorded properly and therefore also treated correctly for tax purposes." App. 0083 (Compl. Ex. E). Nothing in his communications identified, described, or suggested that the questioned expenses were fraudulent. *See id.*; *see also* App. 0024-33 (July Mem. Dec. at 10-19 (discussing June 2008, October 2008, and November 2007 emails)).

In working to resolve issues he was hired to resolve, Wiest did nothing to indicate that he was blowing the whistle on unlawful activity. Emails requesting information and providing suggestions on proper tax treatment of certain expenses do not provide information about a potential SOX violation. *See Day v. Staples, Inc.*, 555 F.3d 42, 57 (1st Cir. 2009) ("A generalized allegation of inaccuracy in accounting is insufficient to establish a reasonable belief in a violation of GAAP, much less a reasonable belief in shareholder fraud."). Although the Complaint makes conclusory allegations that Wiest's inquiries into expenditures and accounting practices implicated "fraudulent accounting practices, attempted shareholder fraud, and lack of compliance with United States Generally Accepted Accounting Principles ("GAAP") (*see* App. 0036 (Compl. ¶ 2)), the emails in which Wiest raises questions about certain corporate expenses did not in any way relate to fraud or a law covered by SOX. *See, e.g.*, App. 0083-84, 0112-23 (Compl. Exs. E, M, N, & O).

In arguing for reversal of the district court's decision, Plaintiffs-Appellants argue that the district court committed reversible error by failing to apply the Department of Labor Administrative Review Board's ("ARB") decision in *Sylvester v. Parexel International LLC*, ARB Case No. 07-123, 2011 WL 2165854 (May 25, 2011). If the Court exercises jurisdiction over the case, the district court's decisions should be affirmed because (1) the ARB's interpretations of SOX are not entitled to deference, and (2) regardless of what standard applies, Plaintiffs-Appellants cannot allege that Wiest was a whistleblower. An employee's questioning of expenses pursuant to his assigned job duties, without more, cannot constitute protected activity. Moreover, Wiest could not have reasonably believed that he was blowing the whistle on accounting or shareholder fraud. If this Court were to reach the merits, it should affirm the decisions below because Plaintiffs-Appellants cannot allege protected activity under any standard.[2]

ARGUMENT

I. The ARB's Interpretations Of SOX Are Not Entitled To Deference.

Plaintiffs-Appellants contend that the district court erroneously stated that, in order to constitute protected activity, a plaintiff's communications must definitively and specifically relate to one of the substantive laws enumerated in

[2] The scope of protected activity under SOX is an issue of particular concern to Chamber members. The Chamber also supports Appellees' position as to the other issues it has presented for review.

SOX. They contend that the "definitively and specifically" standard is no longer good law because it has been overturned by the ARB in *Sylvester v. Parexel International LLC*, 2011 WL 2165854. *See* Appellants' Br. at 17. They further assert that the ARB's decision in *Sylvester* is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Neither contention is correct. The ARB's interpretations are not entitled to *Chevron* deference because it is not uniquely charged with administering or interpreting SOX. In any event, the ARB's decision in *Sylvester* did not overrule the "definitively and specifically" standard.

A. Administration And Interpretation Of SOX Are Not Committed To The ARB.

After the district court dismissed the Complaint for failure to state a claim, Plaintiffs-Appellants filed a Motion for Reconsideration on the grounds that the ARB's decision in *Sylvester* constituted an intervening change in controlling law. The district court correctly found that an ARB decision is not binding authority on a United States district court and therefore cannot constitute a change in controlling law that warrants reconsideration. *See* App. 0010 (Nov. Mem. Dec.). Moreover, the district court need not accord *any* deference to the ARB's interpretations of 18 U.S.C. § 1514A because the ARB is not uniquely charged with administering or interpreting SOX.

Deference is not warranted where, as here, Congress has not given a federal agency unique responsibility for administering a statute. In *Chevron*, the Supreme Court announced that, if a statute is silent or ambiguous on a particular question, a court will defer to an agency's reasonable construction of the statue, if "th[e] choice represents a reasonable accommodation of conflicting policies that were ***committed to the agency's care***." 467 U.S. at 843-45 (emphasis added) (internal quotation marks omitted). Deference is not warranted, however, where an agency does not have exclusive authority over a statute. Courts, for instance, have not afforded *Chevron* deference to an agency's interpretation of a statute where Congress has granted more than one agency authority to interpret the same statute. *See, e.g.*, *Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000) ("When a statute is administered by more than one agency, a particular agency's interpretation is not entitled to *Chevron* deference."). In those circumstances, an agency cannot command deference on the theory that Congress delegated it sole authority to resolve statutory ambiguities. *See id.*; *Salleh v. Christopher*, 85 F.3d 689, 692 (D.C. Cir. 1996).

So too here. Sarbanes-Oxley is not committed to the ARB's discretion because Congress gave federal district courts overlapping adjudicative jurisdiction. A person alleging discrimination under SOX may file an administrative complaint with the Secretary of Labor. *See* 18 U.S.C. § 1514A(b)(1)(A). An administrative

appeal to the ARB is available, but not mandatory. *See id.*; *Day v. Staples, Inc.*, 555 F.3d 42, 52-53 & n.5 (1st Cir. 2009). Rather, if the Secretary of Labor 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, the claimant may file suit in the appropriate federal district court, which will have jurisdiction over such action regardless of the amount in controversy. 18 U.S.C. § 1514A(b)(1)(B). The provision providing for *de novo* judicial review after 180 days is significantly different from the customary relationship between agencies and courts, where judicial review is available only after the agency issues a final order. *See, e.g.*, 28 U.S.C. §§ 2342-44 (describing courts of appeals' jurisdiction over certain final agency orders); 29 U.S.C. § 160(b) & (f) (unfair labor practice cases heard initially before the National Labor Relations Board, and in court only after issuance of the Board's "final order"); 29 U.S.C. § 660 (cases before the Occupational Safety and Health Review Commission eligible for judicial review only after final order from the Commission).

As a practical matter, it is not possible within 180 days for OSHA to conduct a SOX investigation and render a decision, for the case then to be decided—often after a bench trial—by an administrative law judge, and then for an appeal to be briefed and decided by the ARB. Accordingly, a great number of the SOX cases that reach the federal courts are—like this one—cases in which a federal district

court, not the ARB, is called upon to interpret SOX in the first instance. *See, e.g.*, *Lawson v. FMR LLC, et al.*, 670 F.3d 61 (1st Cir. 2012); *Day*, 555 F.3d at 45.

Moreover, when SOX cases are filed in district court after waiting 180 days before the Labor Department, the court is to review the case "*de novo*." 18 U.S.C. § 1514A(b)(1)(B). Federal courts exercising *de novo* review have independent authority to interpret the substantive provisions of Section 1514A. It follows that deference should not be afforded to prior interpretations of the ARB that have been articulated in *other* cases. *Cf. N.J. Dep't of Envtl. Prot. v. U.S. Nuclear Regulatory Comm'n*, 561 F.3d 132, 136 n.4 (3d Cir. 2009) ("[W]hen we are called upon to resolve pure questions of law by statutory interpretation, we decide the issue de novo without deferring to an administrative agency that may be involved.") (internal quotation marks omitted).[3]

[3] Even within the Department of Labor, authority is fragmented and not as comprehensive as agencies' authority over other statutes. Section 1514A delegates to the Secretary of Labor the authority to enforce Section 1514A through formal adjudication. *See* 18 U.S.C. § 1514A(b)(1). The Secretary delegated enforcement responsibility to the Assistant Secretary of Occupational Health and Safety ("OSHA"), *see* 67 Fed. Reg. 65,008, 65,008 (Oct. 22, 2002), and delegated review of decisions by Department of Labor ("DOL") Administrative Law Judges to the ARB. *See* 67 Fed. Reg. 64,272, 64,272-73 (Oct. 17, 2002). The DOL does not have substantive rulemaking authority under SOX. *See Lawson*, 670 F.3d at 82 ("In this case, the DOL has explicitly stated that '[t]he Department of Labor does not have substantive rulemaking authority with respect to section 1514A' . . . .") (first alteration in original). Thus, when OSHA promulgated procedural regulations implementing Section 1514A, it tacitly admitted that the rules were not entitled to deference. *See* Procedures for the Handling of Discrimination Complaints Under Section 806

This rule accords with sound judicial administration, since it would be disruptive to the orderly development of the law if federal courts were required to defer to ARB interpretations of the statute that they jointly interpret. Federal district and circuit courts are developing a body of law on the meaning of SOX arising out of final decisions issued in cases coming up through the federal courts. It would upend the judicial process and settled precedent if the federal courts were required to revise their independent interpretations to conform to case-by-case applications in administrative adjudications. Requiring the federal courts to reverse their own settled precedents in light of more recent pronouncements by the ARB would result in particular confusion given the ARB's recent tendency to reject its prior decisions. In *Sylvester,* for example, the ARB rejected its own prior rulings or rulings of the federal courts on at least five separate points of law—not counting the "definitively and specifically" standard articulated in the *Platone* case.

In short, Congress has not entrusted the ARB with exclusive or even predominate authority to administer or interpret SOX. The ARB's authority to issue final agency decisions in administrative adjudications does not require deference to the agency's interpretations. Indeed, Congress's provision for ***de***

of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, Final Rule, 69 Fed. Reg. 52,104, 52,105 (Aug. 24, 2004) ("These rules are procedural in nature and are not intended to provide interpretations of the Act.").

novo judicial application is ***inconsistent*** with the idea of deference to the ARB's adjudications. Where Congress has not vested an agency with substantive rulemaking authority or exclusive adjudicatory authority, it is inappropriate to assume the agency has special competence in filling statutory gaps or to construe the congressional delegation as an implicit authority to interpret an Act. Accordingly, the ARB's interpretations of SOX are not entitled to deference under *Chevron*.[4]

B. The "Definitively and Specifically" Standard Survives *Sylvester*.

For the reasons stated above, federal courts should not defer to the ARB's interpretations of SOX. Even if deference were warranted, the district court did not err in applying the "definitively and specifically" standard. In *Platone v. FLYi, Inc*., ARB Case No. 04-154, 2006 WL 3246910 (Sept. 29, 2006), the ARB held that, in order to be protected, an employee's communications "must relate

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[4] Even if SOX were committed to the ARB, to the extent the ARB has rendered conflicting interpretations of the Act and its departure from previous well-reasoned precedent lacks an adequate explanation and the power of persuasion, its decisions would not be entitled to deference under *Chevron* or *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944). *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009); *Lawson*, 670 F.3d at 82 (stating agency's statutory interpretation is entitled to respect only to the extent it has the "'power to persuade'") (quoting *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006)); *McGraw v. Barnhart*, 450 F.3d 493, 501 (10th Cir. 2006) (stating that, "[u]nder *Skidmore*, the degree of deference given informal agency interpretations will vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position") (internal quotation marks omitted).

'definitively and specifically' to the subject matter of the particular statute under which protection is afforded." *Id.* at *8.

Federal courts considering the scope of SOX-protected activity—with or without reliance on the ARB's "definitively or specifically" standard—have distinguished between generalized reports and the provision of information about fraudulent or illegal activity that can damage investors in publicly traded companies. *See, e.g.*, *Vodopia v. Koninklijke Philips Elecs., N.V.*, 398 F. App'x 659, 662-63 (2d Cir. 2010); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996-97 (9th Cir. 2009); *Harp v. Charter Commc'ns*, 558 F.3d 722, 724-26 (7th Cir. 2009); *Day*, 555 F.3d at 55-57; *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008). Those decisions reflect the common-sense conclusion that the SOX whistleblower provision protects only those reports that implicate the laws enumerated in SOX. The specificity requirement advances the remedial aims of SOX by encouraging employees to articulate the nature and circumstances of their concerns, so that employers can devote appropriate resources to assessing them.

Appellants contend that the ARB's en banc decision in *Sylvester v. Parexel International, LLC*, 2011 WL 2165854, overturned *Platone's* "definitively and specifically" standard. Not so. In *Sylvester*, the ARB merely faulted the ALJ's ***application*** of the "definitively and specifically" standard. After tracing the

origins of the test, the ARB noted that the test had been followed in a number of ARB and federal court decisions. *Id*. at *15. It then remarked that "the standard announced in *Platone* has ***evolved into*** an inappropriate test and is ***often*** applied too strictly," stating that "[t]his case is an example." *Id*. (emphases added). It then concluded that it was error for the ALJ to dismiss the complaint for failure to meet the heightened requirement. *See id*.

Although the ARB went on to state that in SOX cases "the critical focus" is on whether the employee reported conduct that she believes constitutes a violation of federal law, the ARB did not overrule the "definitively and specifically" standard. *Sylvester*, 2006 WL 3246910 at *15. The ARB stated in dicta that the "definitively and specifically" standard presents a "***potential*** conflict" with the "reasonably believes" test. *Id*. at *14 (emphasis added). But it did not hold that the two tests were irreconcilable or disavow use of the "definitively and specifically" evidentiary standard in all cases—a fact highlighted by the separate opinions in the case. In a concurrence, Judge Corchado joined by Judge Royce explicitly criticized the majority for "leaving unresolved whether the *Platone* 'definitive and specific' standard is an essential element of a SOX whistleblower case." *Id.* at *19 (Corchado, J., concurring).

In short, Plaintiffs-Appellants erroneously assumed that *Sylvester* overruled the "definitively and specifically" standard. Yet, a careful reading of the ARB's

decision in *Sylvester* makes clear that the ARB did not resolve whether the "definitively and specifically" standard remained an essential element of a SOX whistleblower complaint before the agency, much less purport to overrule all the federal appellate and district court decisions adopting that reasonable interpretation of the statute. Accordingly, the district court did not err by applying the "definitively and specifically" standard in the wake of *Sylvester*. That is especially true where, as here, the district court's application of the "definitively and specifically" standard is in harmony with the "reasonably believes" standard because Plaintiffs-Appellants cannot plead protected activity under any standard. *See* App. 0010 (Nov. Mem. Dec.).[5]

II. Plaintiffs-Appellants Have Failed To Allege That Wiest Is A SOX Whistleblower.

The district court's conclusion—that Wiest's communications questioning documentation and approval prior to processing payments did not constitute protected activity—is supported by the statutory text, case law, subsequent

[5] *Sylvester* was a decision by the full ARB sitting *en banc*. In subsequent cases, panels of the ARB have stated that the "definitively and specifically" standard is incorrect and have indicated that the ALJ's reliance on the standard was erroneous. *See, e.g.*, *Zinn v. Am. Commercial Lines, Inc*., ARB Case No. 10-029, 2012 WL 1143309, at *4 n.33 (Mar. 28, 2012). For the reasons explained above, that is not what *Sylvester* held. *Ipse dixit* statements of a prior agency interpretation from *individual panels* of the ARB surely do not constitute a thoughtful reconsideration under *Fox Television Stations*, 556 U.S. at 514-16, or *Motor Vehicle Manufacturers Association of United States, Inc. v. State Farm Mutual Automobile Insurance Co*., 463 U.S. 29, 43 (1983).

legislative developments, and common sense. Wiest's inquiries performed as part of his job responsibilities did not amount to "protected activity" under SOX. In addition, he could not have reasonably believed that the conduct he was questioning constituted a violation of federal law.

A. Wiest's Performance Of His Job Responsibilities Does Not Constitute Protected Activity.

The SOX whistleblower provision prohibits employers from discharging or otherwise retaliating against an employee because the employee provided information to the employer or the federal government relating to alleged mail fraud, wire fraud, bank fraud, or securities fraud against shareholders, or violations of SEC rules or other federal laws relating to fraud against shareholders. 18 U.S.C. § 1514A. As relevant here, to be protected, an employee must provide protected information to (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). *Id*. § 1514A(a)(1).

Whistleblower protection does not attach to every internal communication raising a question about corporate business practices. *See, e.g.*, *Day*, 555 F.3d at 54 ("The plain language of SOX does not provide protection for any type of information provided by an employee but restricts the employee's protection to

information only about certain types of conduct."). Whistleblowing—as the term implies—must be loud and clear. The first two modes of protected communication—providing information to the federal government—involve an employee taking affirmative action outside the scope of her job duties in a manner that clearly signals the belief that something improper has occurred that raises extraordinary concerns. Statutory provisions should be interpreted in light of the company they keep. *See Corley v. United States*, 129 S. Ct. 1558, 1566 n.5 (2009) (stating that it is a "cardinal rule" of statutory construction that a "statute is to be read as a whole") (internal quotation marks omitted); *Gustafson v. Alloyd Co*., 513 U.S. 561, 575 (1995) (relying upon the cannon of "*noscitur a sociis*" "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.") (internal quotation marks omitted). The third prong under SOX—making internal reports—similarly should be interpreted to require an employee to step outside her usual role in a manner that clearly communicates the belief that there has been fraud.

Congress enacted SOX to detect and deter securities fraud. It accomplished this objective, in part, by creating whistleblower protection for employees of publicly-traded companies who provide information about fraud against shareholders. The statute's whistleblower protection extends only to reports that

are reasonably calculated to further the law's purpose. Protecting general inquiries made pursuant to an employee's regular duties would undermine the effectiveness of whistleblowing. If oblique references made in the ordinary course were enough to gain protection, companies would be less likely to recognize allegations of wrongdoing when they were made and when the company was in a position to swiftly address them.

Courts interpreting other whistleblower provisions have denied whistleblower status to employees who sought special protection for nothing more than performing their jobs. In *Sassé v. Department of Labor*, the Sixth Circuit Court of Appeals denied whistleblower protection under three environmental statutes to a prosecutor in the U.S. Department of Justice who investigated and prosecuted environmental crimes. 409 F.3d 773, 777, 780 (6th Cir. 2005) (holding that whistleblower provisions in environmental statutes "protect employees who risk their job security by taking steps to protect the public good"). Similarly, the Federal Circuit held that a Department of Agriculture employee had not engaged in protected conduct under the Whistleblower Protection Act when he reported that some of the farms he was charged with reviewing for compliance with USDA regulations were not in compliance. *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1144 (Fed. Cir. 1998). The court rejected the plaintiff's invitation to rule that "nearly every report by a government employee concerning the possible breach of law or

regulation by a private party is a protected disclosure" under the Whistleblower Protection Act. *Id.*; *see also Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1344 (Fed. Cir. 2001) (holding that employee who makes disclosures as part of his normal duties cannot claim the protection of the Whistleblower Protection Act).

Those same considerations weigh against extending SOX whistleblower protection to every individual who raises questions about corporate practices. Large corporations employ numerous individuals (often entire departments) to identify, assess, and resolve issues arising out of the corporation's day-to-day operations that may affect the corporation's finances in some respect. Extending protection to such communications would mean that compliance personnel engage in protected activity ***every time*** they express views on the appropriate handling of matters within the scope of their responsibility. The nature of corporate compliance work would therefore insulate all compliance personnel from legitimate employment actions by making any discipline for work performance presumptively illegal. *See Huffman*, 263 F.3d at 135 & n.4. Providing automatic protection to entire departments of a corporation would enlarge the scope of the SOX whistleblower provision beyond recognition. Furthermore, federal agencies and the courts would be inundated with whistleblower claims that have little, if any, discernable connection to securities or shareholder fraud, making it difficult to provide timely relief to meritorious claimants.

Holding that SOX automatically confers special whistleblower protections on every employee in the financial section who processes expenses or reconciles accounts would fundamentally alter the nature of at-will employment for compliance personnel. The basic principle of at-will employment is that an employee may be terminated for a "good reason, bad reason, or no reason at all." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 606 (2008) (internal quotation marks omitted). Ordinary dismissals, accordingly, are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. *Id*. Congress and the States have crafted narrow exceptions to at-will employment to protect employees from discharge for impermissible reasons. *See id*. at 606-07 (discussing at-will employment of public sector employees). The Court should not interpret SOX so as to uniquely insulate one group of employees. Indeed, to do so would have the perverse effect of making it more difficult to hold to a high standard company employees whose effective performance of their jobs is essential to achieving SOX's over-arching purposes.[6]

[6] Subsequent statutory developments confirm that SOX does not protect internal communications made pursuant to an employee's assigned duties. Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd Frank") added a new whistleblower protection provision that prohibits retaliation against employees who have provided certain protected information "whether at the initiative of the employee or in the ordinary course of the duties of the employee." 124 Stat. 2031. Although Dodd-Frank also amended the coverage of the existing SOX whistleblower provision to, among other things, extend the statute of limitations

Simply stated, the Complaint alleges only that, in his capacity as auditor for Tyco, Wiest performed his job duties by raising questions about expense reports within the normal course. Nothing about his words or actions suggest that he was reporting a suspected SOX violation. Wiest's performance of assigned compliance duties does not insulate him from investigations into allegations that he had an inappropriate relationship with an employee, made inappropriate comments to other employees, and failed to report a gift.

B. Wiest Did Not Reasonably Believe That He Was Reporting A SOX Violation.

SOX protects an employee's communication only if he reasonably believes the employer's conduct constitutes a violation of one of the six enumerated categories. *Van Asdale*, 577 F.3d at 1001. The "reasonable belief" requirement has both a subjective and objective component. *Day*, 555 F.3d at 54. The Complaint fails on both counts.

The Complaint fails to allege a subjectively or objectively reasonable belief of a SOX violation for at least three reasons. *First*, the exhibits attached to the Complaint demonstrate that Wiest made inquiries regarding the proper accounting

from 90 to 180 days (sec. 922(c), 124 Stat. 1848), Congress did not expand the scope of protected activities under SOX. Congress thus clearly knew how to cover employees' disclosures in the ordinary course of their duties, but chose not to enlarge the types of communications protected under Section 1514A while amending SOX in other respects. This Court should not endeavor to do what Congress did not.

or tax treatment of certain expenses. As an initial matter, discussion and even disagreement over job-related activities are normal parts of most occupations. *Willis*, 141 F.3d at 1443. Electing not to process expenses until receiving additional documentation or approval from colleagues and superiors is not equivalent to a report of wrongdoing. *Cf. id.* ("'[C]riticism directed to the wrongdoers themselves is not normally viewable as whistleblowing.'") (quoting *Horton v. Dep't of Navy*, 66 F.3d 279, 282 (Fed. Cir.1995)).

Second, the reasonableness of Wiest's belief must be evaluated against laws specified in SOX. *Day*, 555 F.3d at 55. "To have an objectively reasonable belief there has been shareholder fraud, the complaining employee's theory of such fraud must at least approximate the basic elements of a claim of securities fraud." *Id*; *see also Allen*, 514 F.3d at 479-80. "Claims that there has been accounting fraud thus require evidence beyond a belief in a mere accounting irregularity . . . ." *Day*, 555 F.3d at 57. The Complaint falls well short of that mark. Wiest's emails to his colleagues and supervisors suggesting further review and requiring additional documentation have *no discernable link* to a possible SOX violation. Wiest did not indicate that insufficient expense reports or failure to comply with internal approval process amounted to accounting or shareholder fraud. Nor does he suggest that the company intentionally disregarded accounting protocols or misrepresented material information on financial statements. *See id*. at 56-57. In

short, his emails do not support an inference that he subjectively or objectively believed that his inquiries regarding proper accounting or tax treatment were related to a potential concern about a SOX violation.

Third, even assuming Wiest subjectively believed the company was violating SOX, the Complaint demonstrates that such a belief was not objectively reasonable. As the district court noted, the company often followed Wiest's advice regarding the need for further review or the proper classification of expenses. *See, e.g.*, App. 0029 n.7 (July Mem. Dec.); App. 0046, 0048 (Compl. ¶¶ 44, 51). It is not reasonable to infer a fraudulent intent to deceive shareholders when, among other things, he was hired to ensure proper accounting treatment, other employees worked with him to provide proper approval and documentation, and they resolved the issue in a manner consistent with what he thought was necessary. *See Harp*, 558 F.3d at 724-26.

* * *

In apparent recognition that Wiest's communications cannot support a subjective or objective belief that he was raising or sought to remedy illegal or fraudulent conduct, the Complaint falls back on the allegation that Wiest engaged in protected activity because if he had processed expenses as originally submitted, there would have been a violation. *See* App. 0043-44 (Compl. ¶ 35). In short, he alleges the unremarkable fact that, if a compliance officer fails to perform his

assigned compliance duties, the company might have been noncompliant. Wiest claims whistleblower status here—*not because he actually blew the whistle on illegal activity*—but because he participated in internal processes designed to ensure compliance. That is not and cannot be the law.

CONCLUSION

If the Court takes jurisdiction over the case, the judgments of the district court should be affirmed.

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Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Third Circuit Rule 28.3(d), I hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit, having been admitted thereto in July 2007.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, TYPE STYLE REQUIREMENTS, VIRUS-FREE REQUIREMENT, AND IDENTICAL COMPLIANCE OF BRIEFS

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4. The paper copies of this Brief submitted to this Court and served on Counsel of Record are identical to the version filed electronically.

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2011, I electronically filed the foregoing Brief of Amicus Curiae and Notice of Appearance with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I further certify that 10 hard copies of this Brief have been mailed to the Clerk's Office and hard copies of this Brief have been served upon the following via UPS next-day air:

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