No. _____

In the
Supreme Court of the United States

NICHOLAS P. TIDES;
MATTHEW CRAIG NEUMANN,

Petitioners,

v.

THE BOEING COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Sarbanes Oxley Act of 2002 ("SOx") § 806 ban the use of media by whistleblowers to "cause information to be provided" to Congress and Federal agencies?

2. Is anonymous communication to Congress and Federal agencies through the media a "per se" abuse of the protection of SOx § 806 such that the pretext analysis of *McDonnell Douglas*[1] is not applicable?

3. Is termination for allegedly revealing terms and conditions of employment through the media (which is protected activity under Section 7 of the National Labor Relations Act) a pretext when applied to a whistleblower protected under SOx § 806?

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[1] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). SOx § 806 slightly modifies the burden shifting of *McDonnell* as described below.

PARTIES TO THE PROCEEDINGS

The Petitioners (appellants below) are Nicholas P. Tides and Matthew C. Neumann. The Respondent (appellee below) is The Boeing Company.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 644 F.3d 809.[2] The District Court's Order is available at 2010 WL 537639, 93 Empl. Prac. Dec. P 43,813, 30 IER Cases 515, 2010 O.S.H.D. (CCH) P 33.[3]

JURISDICTION

The Court of Appeals for the Ninth Circuit denied Petitioner's Petition for En Banc Hearing on June 9, 2011.[4] This Court has jurisdiction under 28 U.S.C. § 1254(1).

Federal courts have exclusive jurisdiction of cases arising under Sarbanes Oxley § 806[5] if the Department of Labor ("DOL"), through the Occupational Safety & Health Administration ("OSHA"), has not issued a *final* order within 180 days and the delay is not a result of the complainant's bad faith.[6] In this

[2] A copy of the United States Court of Appeals for the Ninth Circuit Opinion, Docket 48-2, dated May 3, 2011, is attached as App. pages 1-17.

[3] A copy of the United States District Court, Washington Western Division, Order, Docket 36, dated Feb. 9, 2010, is attached as App. pages 18-27.

[4] A copy of the United States Court of Appeals for the Ninth Circuit Order, Docket 50, dated June 9, 2011, is attached as App. 28.

[5] Codified as 18 U.S.C. § 1514A.

[6] The complainant may withdraw his complaint with OSHA and file an action for *de novo* review in federal district court.

(Continued on following page)

case, the DOL has issued letters affirming the Petitioners' right to proceed *de novo* in federal district court.[7] Petitioners timely appealed the district court's order granting summary judgment to the defendant.

RELEVANT PROVISIONS INVOLVED

SOx § 806[8]

Civil action to protect against retaliation in fraud cases:

> **(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. § 78l), 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

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18 U.S.C. § 1514A(b)(1)(B). *See Kelly v. Sonic Auto. Inc.*, ARB 08-027, 2008-SOx-003 (ARB Dec. 17, 2008) (affirming ALJ's decision that the DOL was deprived of jurisdiction over the complainant's SOx complaint once the complainant filed his action in district court seeking *de novo* review).

[7] *See* United States District Court, Washington Western Division, Order, Docket 36, dated Feb. 9, 2010, attached as App. 20.

[8] 18 U.S.C. § 1514A (emphasis added).

Exchange Act of 1934 (15 U.S.C. § 78c), 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);

(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.

Section 7 of the National Labor Relations Act[9]

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining **or other mutual aid or protection**, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

STATEMENT OF THE CASE

For the first time in judicial history, a court has decided that a whistleblower cannot "cause" information to be provided to a "federal regulatory or law enforcement agency" or "any Member of Congress or

[9] 29 U.S.C. § 157 (emphasis added).

any committee of Congress" through the media. The Ninth Circuit Panel based its decision on the failure of Congress to specify the media as a permitted means of communication. The Panel failed to note that in SOx § 806 Congress did not specify any permitted means of communication thereby leaving the selection of communication methods to the whistleblower.

Congress knew that whistleblowers often must exert significant effort to draw attention to their concerns. SOx § 806 should be read to permit a whistleblower to use a bull horn in front of Congress to get the attention of a Member of Congress. SOx § 806 should be interpreted to allow picketing Congress with signs demanding Boeing comply with SOx.

Nothing in SOx § 806 requires the whistleblowing to be kept confidential. Congress knows that telling a Member of Congress is one of the best means of causing information to become public and did not foreclose that option to whistleblowers.

There are good reasons to grant this petition: 1) There is likely to be a split in the circuits over the proper means of communication to cause information to be provided to Congress and Federal agencies; 2) This Court can use this case as an opportunity to carry out the intent of Congress to set the law on a trajectory to protect whistleblowers; 3) The Ninth Circuit may have overruled numerous administrative decisions that hold that the media can be a mode of communication for a whistleblower; 4) The Ninth Circuit decision will encourage other Circuits to

further erode whistleblower protection; 5) Chilling media access to information on corporate fraud will have a disastrous effect on the battle to clean up corporate America; and 6) The word "cause" is used in several whistleblower protection statutes magnifying the negative impact of the Ninth Circuit decision.

This Court should grant certiorari, uphold the Department of Labor's interpretation of SOx § 806, and provide clear guidance to the Circuit Courts. This Court should hold that whistleblowers protected by SOx § 806 may use any lawful means, including media, to communicate to Congress and Federal agencies. This Court should further hold that if the communication is lawful, there are no per se exceptions to the *McDonnell Douglas* and SOx § 806 pretext analysis.

A. Relevant Legal Standard

SOx § 806 protects employees of publicly-traded companies from discrimination in the terms and conditions of their employment when they take action to report conduct that they reasonably believe constitutes certain types of fraud or Securities Exchange Commission ("SEC") rule violations.

SOx § 806 claims are governed by a burden-shifting procedure under which the plaintiff is first required to establish a prima facie case of retaliatory discrimination. SOx § 806 provides that a whistleblower action "shall be governed by the legal burdens

of proof set forth in [AIR21]".[10] The burden-shifting framework of *McDonnell Douglas* and other cases decided under federal anti-discrimination statutes applies generally to SOx cases, but the quantum of proof imposed on the parties is changed. Under SOx and AIR21, a complainant may prevail merely by showing that an improper motive was a "contributing factor" in the employment decision. Once this relatively low quantum of proof is established by the complainant, a Respondent seeking to avoid liability using a "mixed motive" analysis must show by "clear and convincing evidence" (rather than a simple "preponderance of the evidence") that it would have taken the same employment action even in the absence of complainant's protected activity.[11]

To make out a prima facie case, the Ninth Circuit Panel correctly pointed out that the plaintiff must show that: (1) he engaged in a protected activity or conduct; (2) his employer knew or suspected, actively or constructively, that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the circumstances were sufficient to raise an inference that the protected activity was a contributing factor in the unfavorable action.[12] If the

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[10] 18 U.S.C. § 1514A(b).

[11] Except in this case, where the media was used to communicate, the Ninth Circuit has accepted this burden shifting approach. *See Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996 (9th Cir. 2009); 29 C.F.R. § 1980.104(b)(1)(i)-(iv).

[12] *Id*.

plaintiff meets his burden of establishing a prima facie case, then "the employer assumes the burden of demonstrating by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the plaintiff's protected activity".[13]

B. Facts of the Case

Internal auditors, Matt Neumann and Nick Tides, joined the Boeing Company's ("Boeing") Sarbanes Oxley IT audit team eager to comply with the rules. Boeing had a different objective. It had failed the tests on its internal controls in its IT department since SOx became effective in 2004. It was desperate to pass the internal controls audits in 2007 to avoid having the external auditors declare a material weakness which was likely to cause a major decline in Boeing's stock price. Tides and Neumann were unaware that their insistence on compliance with SEC rules would put them on a collision course with Boeing management.

Both Neumann and Tides had been employees of Boeing for a number of years and were on career

[13] *Id*. *See* the Court of Appeals for the Ninth Circuit Opinion, Docket 48-2, dated May 3, 2011, attached as App. 10.

paths toward management.[14] Tides has an MBA and Neumann is a graduate of MIT.[15]

Tides and Neumann, as well as other SOx IT internal auditors, engaged in protected activity from February of 2007 through their termination. Their motivation was simply to help Boeing reform its SOx compliance. Tides and Neumann blew the whistle to their supervisors in and out of their chain of command[16] at least twenty-seven times[17] during the first half of 2007. The complaints related to seven potential or actual violations of federal securities laws.[18] In response they experienced harassment and retaliation.[19] Only after completely exhausting internal channels available at Boeing did Tides-Neumann speak to a reporter upon assurances of confidentiality. Tides called a reporter who had left messages on his work phone a couple of months before. Neumann

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[14] Summary Judgment Exhibit 23, at 2, Excerpts of the Record 3, and Summary Judgment Exhibit 22, at 2, Excerpts of the Record 4.

[15] *Id.*, at 10.

[16] Plaintiffs' Response to Motion for Summary Judgment pages 1-10, Excerpts of the Record 5.

[17] *Id.*, at 10-13.

[18] The potential violations are listed in section **C. Petitioner's Protected Activity** below.

[19] The factual details and the specifics of the protected activity, hostile environment, and retaliation are contained in Plaintiffs' Response to Motion for Summary Judgment, pages 1-14, Excerpts of the Record 5.

spoke to a reporter who made an unannounced visit to his home.

Tides was fired on 9/28/2007 and Neumann was fired on 10/1/2007, ostensibly for confirming a story being investigated by the *Seattle Post Intelligencer* which had come from other sources.

At the time, Plaintiffs Tides and Neumann believed they were justified in contacting the media under Boeing Procedure 3439, which explicitly incorporates the protections of Section 7 of the National Labor Relations Act. The Procedure allows disclosure to the media of work conditions, other terms and conditions of employment, and other matters to the extent privileged by law (including SOx).[20]

Boeing Procedure 3439 provides:

> Nothing in this procedure should be construed as preventing employees from: 1. Discussing or releasing information about wages, hours, working conditions, or other terms and conditions of employment to the extent privileged by Section 7 of the National Labor Relations Act or other law. . . .[21]

Procedure 3439 and Section 7 apply to "all employees" including both union and non-union employees.

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[20] Summary Judgment Exhibit 2, Excerpts of the Record 6.

[21] Summary Judgment Exhibit 2, Excerpts of the Record 6.

Boeing PRO-3439[22] exempts dissemination of information outside the company if an overriding company or public interest exists. Tides-Neumann maintain their communications concerned working conditions and therefore they did not violate Boeing procedure. In addition, the public has an interest in the enforcement of SOx.

Boeing justified the firings as violations of Procedures 3439 and 2227 claiming the information given by Tides-Neumann was not exempt under the terms of the Procedures.[23]

Boeing Procedure 2227 specifies the proper means of information protection.[24] Violation of Procedure 2227 is subject to Human Resources publication "Employee Corrective Action Guidelines". The Guidelines proscribe the usual penalty for violation of Procedure 2227 as "verbal warning".[25]

Plaintiffs asked Boeing to identify previous discipline of other employees for contacts with media and were given only one example. In that case the person had also violated securities fraud laws relating

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[22] Summary Judgment Exhibit 2, Excerpts of the Record 6, Section 2(D)(2).

[23] *Id*.

[24] Summary Judgment Exhibit 4, Excerpts of the Record 8.

[25] Summary Judgment Exhibit 5, at 14, Excerpts of the Record 9.

to insider trading.[26] Tides-Neumann maintain the true reason they were fired was for the twenty-seven internal whistleblowing reports and their refusal to stop whistleblowing.

The District Court agreed that Tides-Neumann's contact with the media was connected to the "terms and conditions of employment" but erroneously held that Section 7 only applied to members of a union.[27]

C. Petitioners' Protected Activity

Twenty-seven times Tides-Neumann provided information to their supervisors in and out of the chain of command relating to seven actual or potential violations of rules or laws designed to protect investors.[28] They are:

1) The Corporate Governance Rules of the New York Stock Exchange require internal auditors who are controlled solely by the audit committee and whose opinions are consulted. These rules were

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[26] Summary Judgment Exhibit 6, Excerpts of the Record 10.

[27] District Court Order paragraph 1 at 6, Excerpts of the Record 1. The District Court did not note that the exception in Procedure 3439 was not limited to union members.

[28] This list is a summary of pages 16-27 of Plaintiffs' Response to Motion for Summary Judgment, Excerpts of the Record 5.

approved by the SEC on 11/4/2003 under § 19(b)(2) of the Exchange Act.[29]

2) The Securities Exchange Act of 1934 requires reporting companies to maintain a system of accurate internal accounting controls.[30]

3) The SEC rule that requires public companies to adopt a suitable control framework and recommends COSO.[31] Boeing adopted COSO.[32]

Boeing also adopted IIA Standards.[33] Failure to have an internal audit division which follows IIA Standards including independence, objectivity, freedom from impairment, freedom from conflicts of interest, use of qualified auditors and a healthy control environment (no significant human resource issues) is a violation of COSO and, therefore, the SEC rule.

4) A SEC rule states: "No person shall knowingly circumvent or knowingly fail to implement a system

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[29] 15 U.S.C. § 78s(b)(2). The Rules are codified in Section 303A of the NYSE's Listed Company Manual (Exhibit 11 to Petitioners' Reply to Boeing's Motion for Summary Judgment.

[30] 15 U.S.C. § 78m(b)(2)(B).

[31] *Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports*, 17 C.F.R. Parts 210, 228, 229, 240, 249, 270 and 274, effective 8/14/2003. COSO is "Committee of Sponsoring Organizations". IIA is one of the Sponsoring Organizations. Plaintiffs' Response to Motion for Summary Judgment, paragraph 1 at 4, Excerpts of the Record 5.

[32] *Id.*

[33] *Id.*

of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2)".[34]

5) Another SEC rule requires Boeing to have documentation that reasonably supports its assessments of its control environment (including human resources policies). The documentation must confirm that the tests of internal controls were appropriately designed, planned, and performed, and results of tests were appropriately considered. Management cannot hide failed controls by merely changing the auditor's report, ignoring the auditor's findings, or counting untested controls as "passed" as Boeing did in this case.[35]

6) Management documentation is required by the Public Company Accounting Oversight Board ("PCAOB") Auditing Standard No. 2: *An Audit of Internal Control Over Financial Reporting Performed in Conjunction With an Audit of Financial*

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[34] 15 U.S.C. § 78m(b)(5).

[35] 17 C.F.R. Parts 210, 228, 229, 240, 249, 270 and 274, paragraph 41 and 42. Section d. Methods of Evaluating. The SEC rule is grounded on SOx and Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)] which requires companies to "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". Also Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)] and *In re Microsoft Corp*., S.E.C. Admin. Proceeding File No. 3-10789 (June 3, 2002) for an example of incomplete records.

Statements,[36] which details management's duties in respect to documentation of controls and states inadequate documentation is a deficiency.

7) Another SEC rule implementing SOx § 303 makes even negligent misleading of external auditors a violation.[37] Tides-Neumann reasonably believed that management was potentially misleading the external auditors by allowing auditees to change audit results and permitting other tampering with the official internal audit records.

D. The Ninth Circuit Refused to Shift the Burden as Required by SOx.[38]

The Ninth Circuit Panel accepted as true the declaration of Boeing that it fired Tides-Neumann for a non-retaliatory reason. It disregarded the fact that Boeing's own Procedure calls for a verbal warning, and the fact that Boeing had never fired anyone for

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[36] The SEC approved Auditing Standard No. 2 on June 17, 2004 (Securities Exchange Act Release No. 49884, 83 S.E.C. Docket 212, 2004 WL 1574003). The SEC approved its replacement (Auditing Standard No. 5) on July 25, 2007 (PCAOB Release No. 2007-005A).

[37] 17 C.F.R. Part 240; Release No. 26050, Release No. 47890, Release No. 34-47890, Release No. IC – 26050, 80 S.E.C. Docket 770, 2003 WL 21148349 (2003). *See* the section, Discussion of Rules, page 5. The final language is "knew or should have known" which according to the Release has historically indicated the existence of a negligence standard. *Id*., Discussion of Rules, page 9.

[38] 18 U.S.C. § 1514A(b).

simply talking to the media. The burden should have shifted to Boeing to prove that the firing was not pretextual by clear and convincing evidence. Boeing has not met its burden to explain why this case is the first time it has fired an employee solely for talking to the media and why it did not follow its Procedure and give a verbal warning.

The Ninth Circuit held that the Court determined on summary judgment that Boeing proved by clear and convincing evidence that not one of the twenty-seven events of protected activity was even a "contributing factor" to the terminations with these words:

> Tides and Neumann do not deny that they provided internal documents to a reporter; they merely claim that such actions are protected. The Court has found that they are not. Accordingly, Boeing has shown, by clear and convincing evidence, that Tides and Neumann would have been dismissed independently of any activity protected under SOX.[39]

The Panel accepted as fact Tides-Neumann violated Boeing policy. However, whether Tides-Neumann complied with Boeing policy allowing discussion of terms and conditions of employment with the media is an issue of fact that has not been

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[39] *Tides v. Boeing Co.*, 2010 WL 537639, *4 (W.D. Wash. 2010). App. 26.

resolved. The Panel did not mention or discuss any of the twenty-seven previous protected activities.

The Panel apparently assumed that the information Tides-Neumann provided through the media was confidential and legally protectable even though Tides-Neumann have convincingly shown that it was not. Whether the information was confidential or not is a question of fact.

REASONS FOR GRANTING THE PETITION

Reason One: There is likely to be a split in the circuits over the proper means of communication to cause information to be provided to Congress and Federal agencies.

Senator Patrick Leahy intended that whistleblowers be protected when "they take lawful acts to disclose information".[40] Therefore SOx § 806 does not specify the means of communication but allows all lawful means. A whistleblower could use a bull horn in front of Congress to try to get the attention of a Member of Congress. A whistleblower could picket Congress with signs calling on Boeing to comply with SOx. Congress left it to the whistleblower to select whatever legal communication methods are useful to call attention to the violations.

[40] 148 Cong. Rec. S7418 (July 26, 2002) (Statements of Sen. Leahy).

Even if SOx § 806 could be understood to expressly prohibit speaking to the media, remedial statutes must not be read literally when the result is contrary to the purpose of the law. Instead, courts must read it with an eye towards its remedial purpose. In *Zipes v. Trans World Airlines, Inc.*,[41] the Court stated:

> In *Love v. Pullman Co.*, 404 U.S. 522 (1972), we announced a guiding principle for construing the provisions of Title VII. Declining to read literally another filing provision of Title VII, we explained that a technical reading would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process".[42]

The *Zipes* principle is relevant here because a SOx § 806 action begins with a filing at OSHA without the need for an attorney.

In a recent example of broad interpretation of a remedial statute, this Court held an oral complaint to one's supervisor is "filed" under the whistleblowing protection provision of the Fair Labor Standards Act.[43] If "filed" is interpreted broadly, there is no reason not to interpret "cause information to be provided" equally broadly. There are cases that hold

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[41] 455 U.S. 385, 397 (1982).

[42] *Id.* at 404 U.S. 527.

[43] *Kasten v. Saint-Gobain Performance Plastics Corp*., 131 S.Ct. 1325, 1331 (2011).

that speaking to the media is a means of disclosing the violation to persons who are able to remedy the wrong.[44] It is therefore more than likely that other circuits will disagree with the Ninth Circuit.

Without Supreme Court guidance, it is expected that the Circuits will decide what means a whistleblower may use for communication. Some may follow Senator Leahy's intent that any form of communication is allowed so long as it is lawful. Others may follow the Ninth Circuit and pick and choose among available means of communication.

Reason Two: This Court can use this case as an opportunity to carry out the intent of Congress and set the law on a trajectory to protect whistleblowers.

To fully understand the intent of Congress it is necessary to put the whistleblowing protection laws in their historical context.

The power of the employer: In former times, "might makes right" had been the governing maxim. The ruler seized power and demanded loyalty oaths from his subjects. Those who objected were punished or eliminated. Today, large public corporations have

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[44] *See Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1351 (Fed. Cir. 2001) (*citing Horton v. Dep't of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995) (holding that media disclosures are an indirect way of disclosing information of wrongdoing to a person in a position to provide a remedy)).

more power than most of the kings of history. The CEO is the new ruler and often demands the same loyalty as his regal ancestors. The result is a code of silence covering up corporate wrongdoing.

In former times, the courts agreed with maxims like *rex non potest peccare*.[45] After power shifted from kings to CEOs, the employee became the new peasant of the factory. The courts cooperated with the barons of industry in the 19th century by replacing the common law's annual fixed-term employment with employment-at-will[46] which increased the power of the "code of silence" as society became less agrarian and more dependent on employment. To overcome the code and promote transparency, Congress has found it necessary to limit employment-at-will with whistle-blowing protection laws.

The reluctance to tattle or squeal: There is another current flowing in human societies that works against the whistleblower. There is deep-seated cultural aversion to revealing another's misdeeds. This is evident at all levels; from street gangs who kill members who "rat" to the police to lawyers who fight proposed ethical rules which would require

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[45] 3 William Blackstone, *Commentaries on the Laws of England* 254 (1768).

[46] *See* 1 William Blackstone, *Commentaries on the Laws of England* 413 (1765). *See* Statute of Labourers, 23 Edw. III, c.1 (1349); Statute of Labourers, 5 Eliz. I, c.4 (1562); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 Am. J. Legal Hist. 118, 120 (1976).

mandatory reporting of fellow-lawyers' crimes and malfeasance.[47] There is a common belief that employees owe a duty of loyalty which includes the duty to cover-up fraud to protect the employer. As the memo to White House Chief of Staff H. R. Haldeman stated, "[L]oyalty is the name of the game".[48]

Congress has attempted to eliminate the code of silence by promoting whistleblowing. The person who is willing to be persecuted for reporting their employers' misdeeds should be protected and even praised. The philosophical basis for this reform includes an important role for the media: "**Publicity is justly commended** as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; . . .".[49] The reason some do not want sunlight to shine on their activities may be summed up in the maxim: "*[D]ilexerunt homines magis tenebras quam lucem errant enim eorum mala opera*".[50]

Senator Leahy emphasized the need for this Court to be a leader in eliminating the culture of silence:

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[47] Some early law promoted whistleblowing. *See, e.g., Leviticus* 5:1 which requires those with information to volunteer to testify.

[48] *Nixon v. Fitzgerald*, 457 U.S. 731, 736 (1981).

[49] Louis D. Brandeis, *Chapter IV: What Publicity Can Do*, New York: Harper's Weekly (December 20, 1913) (emphasis added).

[50] Secundum Johannem 3:19b, *Biblia Sacra* (Iuxta Vulgatam Versionem), Stuttgart: Deutsche Bibelgesellschaft, 1994.

> This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied. . . . Unfortunately, as demonstrated in the tobacco industry litigation and the Enron case, efforts to quiet whistleblowers and retaliate against them for being "disloyal" or "litigation risks" transcend state lines. This corporate culture must change, and **the law can lead the way**.[51]

The issue is so important to Congress that violations of SOx whistleblower protection provisions can be criminal. On November 9, 2004, Senators Grassley and Leahy sent a letter to SEC Chairman William Donaldson advising him that they want "aggressive enforcement to deter retaliation against corporate whistleblowers", and asking: "[w]hat is your position on whether or not a violation of the Section 806 whistleblower prohibitions can generate criminal liability under Section 3(d) [sic] of the Act?" In February 2005, Chairman Donaldson responded to the effect that, while Section 3(b) is a useful provision allowing the SEC to enforce new laws enacted under SOx, the SEC has been guided by the principle that its resources can be applied most effectively to combat

[51] S. Rep. No. 107-146, at 10 (2002) (emphasis added).

substantive violations of the securities laws, thereby leaving it to the Labor Department to investigate and prosecute potential Section 806 whistleblower violations.[52] To date there have been no criminal prosecutions under SOx § 806 by the Labor Department or any other agency.

History of legal protection for whistleblowing: This Court began the transition from *caveat emptor* into *caveat venditor*[53] by finding a duty of disclosure in a stock transaction.[54] Transparency was the goal of the state Blue Sky Laws of the early 20th century. Congress followed the trend with the unanimous passage of the Securities Act of 1933[55] drafted through the leadership of Felix Frankfurter. By the late 1970s many federal and state laws were enacted to protect employees from retaliation for reporting violations to public authorities. Complaints about reprisals could be filed with agencies such as the Equal Employment Opportunity Commission ("EEOC") and OSHA. The trend continued with the Truth in

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[52] *See* James Hamilton, SEC Responds to Senate Letter on Whistleblower Provisions, 2005-32 SEC Today Online (CCH) (Feb. 17, 2005).

[53] *Caveat venditor* may have begun with Judge Benjamin N. Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) which imposed negligence duties in the absence of privity of contract.

[54] *Strong v. Repide*, 213 U.S. 419, 434, 29 S.Ct. 521, 526 (1909).

[55] 15 U.S.C. § 77a.

Lending laws, the Fair Credit Reporting Act, and the Environmental Protection Act.

Senator Patrick Leahy, in a 1977 study entitled *The Whistleblowers*, reported that "federal employees are currently afraid to bring problems to the attention of their superiors". Congress passed the Civil Service Reform Act in 1978. In 1989, the False Claims Act was amended to protect whistleblowers. The Whistleblower Protection Act of 1989 extended whistleblowing protection to federal employees. Most recently, the Dodd-Frank Act of 2011 further extended protection to whistleblowers.

Corruption in the private sector was attacked on a parallel trajectory. Congress passed the Foreign Corrupt Practices Act in 1977 which forced companies publicly listed in the United States to have internal audit departments. This meant that companies must hire independent internal auditors whose duty to truth was superior to their duty of loyalty to their supervisors. The Treadway Commission, an important private sector initiative, started in 1985 and resulted in the formation of the Committee of Sponsoring Organizations ("COSO"). COSO prepared a framework for assessing internal controls. One of the sponsoring organizations of COSO is the Institute of Internal Auditors which has its own code for use by internal auditors. SOx expanded whistleblower protection to all employees in publicly traded companies. In 2003, the SEC passed a rule requiring public

companies to adopt a suitable control framework and recommended COSO.[56]

Call for resolve: Senator Leahy understood that some corporations do not want whistleblowing protections to apply to their employees, noting, "Unfortunately, companies with a corporate culture that punishes whistleblowers for being 'disloyal' and 'litigation risks' often transcend state lines, and most corporate employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law".[57] Therefore, Senator Leahy noted, "U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies".[58]

Congress intended SOx "to shine a bright light into the shadows of America's corporate board rooms so the public is not kept in the dark, and when they make an investment, that investment will be sound and based on truth and openness and honesty".[59]

The United States is facing a battle of wills. Some want to change the code of silence into a code of transparency. Others want to keep the status quo. It will be a tragedy if this Court were to defer judgment

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[56] *See* footnote 31, *supra*.

[57] 148 Cong. Rec. S7420 (July 26, 2002) (Statements of Sen. Leahy).

[58] *Id.*

[59] *See* 148 Cong. Rec. H5466 (July 25, 2002) (Statements of Rep. Kelly).

on this important issue and allow future generations of whistleblowers to suffer because they do not know what form of communication is permitted to get the attention of Congress and Federal agencies.

By declaring disclosures to Congress and Federal agencies through the media are protected activities under SOx, this Court will ensure that whistleblowers are protected for their courageous efforts to protect investors in publicly traded companies.

Reason Three: The Ninth Circuit may have overruled numerous administrative decisions that hold that the media can be a mode of communication for a whistleblower.

SOx whistleblower protection has been delegated to the Department of Labor ("DOL") by Congress.[60] The Department has resisted White House pressure to accept its interpretation of SOx. When signing the Sarbanes Oxley Act, the White House expressed the view that SOx coverage was limited to congressional investigations "authorized by the rules of the Senate or House of Representatives and conducted for a proper legislative purpose".[61] Senators Patrick Leahy and Charles E. Grassley, co-authors of the whistleblower provisions of the Act, immediately challenged this position, writing that the Act does not require

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[60] 18 U.S.C. § 1514A(b)(1)(A).

[61] Sarbanes Oxley Act of 2002: Statement by the President of the United States, 2002 U.S.C.C.A.N. 543 (July 30, 2002).

there be an ongoing investigation of Congress or that the investigation be within the jurisdiction of any Congressional Committee.[62] The Labor Department subsequently rejected the White House signing statement and adopted the congressional view.

Under the DOL SOx regulations, 29 C.F.R § 1980.102(b)(ii), an employee is protected against retaliation for providing information to "any Member of Congress or any committee of Congress". The preamble to the final SOx regulations states that "Complaints to an individual member of Congress are protected, even if such member is not conducting an ongoing Committee investigation within the jurisdiction of a particular Congressional committee, provided that the complaint relates to conduct that the employee reasonably believes to be a violation of one of the enumerated laws or regulations".[63]

OSHA holds that whistleblowing to the media is protected as do other agencies. In this case, OSHA wrote a letter to Boeing stating that Tides' contact with the media was protected.[64] The Ninth Circuit chose to ignore OSHA's determination. This is contrary to settled law:

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[62] *See* Letter from Senators Leahy and Grassley to President George W. Bush (July 31, 2002).

[63] 69 Fed. Reg. No. 163, 52106 (Aug. 24, 2004).

[64] *See* App. pages 29-31, Letter from Rebecca Phelps, Investigator, OSHA, to Russ Perisho, Attorney, Perkins Coie (June 11, 2008).

> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[65]

There are several agency and court decisions that allow a whistleblower to talk to the media in similar circumstances.[66]

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[65] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843-844, 104 S.Ct. 2778, 2782 (1984).

[66] For example, *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1374 (N.D Ga. 2004); *Gutierrez v. Regents of the Univ. of California*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 6 (ARB Nov. 13, 2002); *Wedderspoon v. Cedar Rapids, Iowa*, 80-WPC-1 (Dep't of Labor July 11, 1980); *Phillips v. Stanley Smith Sec., Inc.,* ARB No. 98-020, ALJ No. 1996-ERA-30 (ARB Jan. 31, 2001); *Donovan v. R.D. Andersen Constr. Co., Inc.,* 552 F. Supp. 249, 253 (D. Kan. 1982). The OSH Act cited in

(Continued on following page)

The EEOC Compliance Manual, Section 8-II(B)(2)5 lists the following as an example of protected opposition to unlawful discrimination:

> Complaining **to anyone** about alleged discrimination against oneself or others. **A complaint or protest about alleged employment discrimination to** a manager, union official, co-worker, company EEO official, attorney, **newspaper reporter**, Congressperson, **or anyone else** constitutes opposition. Opposition may be nonverbal, such as picketing or engaging in a production slow-down. Furthermore, a complaint on behalf of another, or by an employee's representative, rather than by the employee herself, constitutes protected opposition by both the person who makes the complaint and the person on behalf of whom the complaint is made.

The EEOC adds that protection depends on a consideration of whether the employee's conduct is "reasonable":

> The manner in which an individual protests perceived employment discrimination must be reasonable in order for the anti-retaliation provisions to apply. In applying a "reasonableness" standard, courts and the Commission balance the right of individuals to

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Donovan mirrors SOx. 29 U.S.C. § 661(c) (OSH Act, Section 11(c)).

> oppose employment discrimination and the public's interest in enforcement of the EEO laws against an employer's need for a stable and productive work environment.[67]

The Ninth Circuit decision may cause the decades-long series administrative decisions to the contrary to be overruled. It is also likely to result in a split among the circuits as administrative decisions are appealed in the future.

Reason Four: The Ninth Circuit decision will encourage other Circuits to further erode whistleblower protection.

The Ninth Circuit decisions will lead to further erosion of whistleblower protection. If speaking to the media is a per se violation of SOx § 806 such that the employer can ignore the burden shifting pretext rules, what other per se violations will the circuit courts invent? This Court should correct this misapplication of the law and provide guidance to the circuits that promotes Congress' intent to provide robust protection for whistleblowers.

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[67] EEOC Compliance Manual, Section 8-II(B)(2)5, *citing Sumner v. United States Postal Serv.*, 899 F.2d 203 (2d Cir. 1990).

Reason Five: Chilling media access to information on corporate fraud will have a disastrous effect on the battle to clean up corporate America.

The media are a well-known means of communicating concerns to the government. The media serve a historical function in prompting government officials to act. The very nature of the media – a means of communication in which the content is shared with the public – gives the media the power to influence government in a way that private forms of communication do not.

For example, the Securities and Exchange Commission did not move to investigate the Enron Corporation's financial irregularities until newspapers broke the story.[68] Despite knowledge of Bernie Madoff's actions from whistleblower reports of Harry Markopolos, the SEC did not take enforcement actions until details of the Ponzi scheme were broken to the press.[69] Empirical analyses of whistleblower cases also note the importance of media disclosures in prosecuting fraud. A study conducted at the Booth School at the University of Chicago noted that 15.5% of corporate fraud is detected by the media, compared

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[68] *See* Alex Berenson, "S.E.C. Opens Investigation into Enron", *N.Y. Times*, Nov. 1, 2001.

[69] *See Assessing the Madoff Ponzi Scheme and Regulatory Failures: Hearing Before the Subcomm. On Capital Markets of the H. Comm. On Financial Services*, 111th Congress (2009) (statement of Harry Markopolos, Certified Fraud Examiner).

to 14.1% detected by self-regulatory organizations, industry regulators, and government agencies.[70] By forcing potential whistleblowers to choose between their careers and the truth, a narrow reading of SOx § 806 risks losing the 15.5% of corporate fraud cases disclosed through the media.

Evidence indicates that SOx has not lived up to its congressional purpose. Of the 700 whistleblower cases filed with OSHA during the first three years after SOx, only 3.6 percent won relief at the initial administrative stage, and only 6.5% won on appeal, suggesting that SOx's employee protection has failed to protect employee whistleblowers as intended.[71]

Employers frequently attempt to claim the information revealed by the whistleblower was "confidential". The interest of the employer must be balanced against the interest of the public: "unquestionably, precluding employees from raising significant concerns because of related confidential or sensitive information ignores critical opportunities to

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[70] Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 40 (University of Chicago 2009).

[71] *See* Joyce Rothschild, *Freedom of Speech Denied, Dignity Assaulted: What the Whistleblowers Experience in the US,* Current Sociology (Virginia Polytechnic Institute and State University) 2008, 884 at 896, *citing* Richard Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. 65-155 (2007).

gain information to protect against serious criminal acts or threats to public safety".[72]

This Court should not wait until the full chilling effect on the media is felt as a result of the Ninth Circuit's decision. The interest of the public in protection from a future Bernie Madoff is too important.

Reason Six: The word "cause" is used in several whistleblower protection statutes magnifying the negative impact of the Ninth Circuit decision.

Congress first used the word "cause" to describe a scope of protected activity in the Federal Coal Mine Health and Safety Act of 1969.[73] Section 110(b)(1) prohibited discrimination against a miner because that miner,

> "(A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter."

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[72] Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. Cin. L. Rev. 183 at 205 (2007).

[73] Pub. L. No. 91-173, 83 Stat. 742, 30 U.S.C. §§ 801, *et seq*. (1970).

In the seminal case on the scope of this language, Judge Wilkey held that a miner's notification to a foreman of possible dangers was "an essential preliminary stage in both the notification to the Secretary (A) and the institution of proceedings (B), and consequently brings the protection of the Safety Act into play".[74]

When Congress enacted the Federal Mine Safety and Health Act of 1977, it preserved the phrasing and protected miners who, "instituted or caused to be instituted any proceeding under or related to this Act". In 1978, Congress enacted the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851[75] and protected an employee who, "caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter . . .". In 1980, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund" Law), 42 U.S.C. § 9610, and protected an employee or representative who, "has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter . . .".

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[74] *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975).

[75] Congress amended the ERA in 1992 and clarified that the modes of engaging in protected activity include notifying one's employer, refusing to engage in illegal activity, and testifying before Congress or in a governmental proceeding. None of these additions could be construed as constricting the protection for disclosures made through the media.

Congress used similar language in the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105, the 2000 Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121, and the Pipeline Safety Improvement Act of 2002 ("PSIA"), 49 U.S.C. § 60129. The pattern points to a congressional desire to draw upon the established body of law for a broad scope of protection. For over three decades, whistleblowers enjoyed an unbroken line of precedent, and continued expansion of statutory protections, that recognized media disclosures as a means by which they might "cause" proceedings to be instituted.

There is no limitation on how a complainant might cause the information to be provided, other than that it must be a lawful act. This provision protects employees when they make disclosures through telephone calls, through written correspondence, through email, through a union safety official, public interest group, or through a newspaper or other media outlet.

When Congress enacted SOx, it intended to give whistleblowers the same protection as federal employees had under the Whistleblower Protection Act. Representative Jackson-Lee stated she supported providing "whistleblowers in the private sector, like Sherron Watkins, the same protections as government

whistleblowers".[76] Senator Leahy echoed Rep. Jackson-Lee's sentiments.

Although the Whistleblower Protection Act includes express protections for employee disclosures through the media,[77] courts should not interpret "cause to be provided" in a narrow sense to defeat Congressional intent.

CONCLUSION

After the scandals of the past decade, Congress desired a bold effort to radically alter the prevailing culture that requires employees to cover up corporate fraud or lose their careers. Congress has mandated the use of sunlight to remedy corporate corruption. It has chosen to encourage whistleblowers to use the light of truth to disinfect public companies. It chose not to specify the means of communication. Therefore, a whistleblower can use email, a cell phone, or the media to carry the message to Congress and Federal agencies.

Congress intends to have history call the 21st century the age of sunlight for corporate America. The Ninth Circuit decision is a step back into the

[76] 148 Cong. Rec. H5473 (July 25, 2002) (Statements of Rep. Jackson-Lee).

[77] *See Horton v. Dep't of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995).

dark ages. This Court has an opportunity to implement SOx § 806 as Congress intended. Whistleblowers in public companies who report fraud are to be protected. The courts must be diligent to promote this change in culture. Only then will this maxim become true in American law, "**Μακάριοι οἱ δεδιωγμένοι ἕνεκεν δικαιοσύνης**".[78]

Respectfully submitted,

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[78] "Happy are those who are persecuted for standing up for what is right". **KATA MAΘΘAION**, 5:10a, *The Greek New Testament*, Stuttgart: Deutsche Bibelgesellschaft:1998. This maxim is probably derived from "אשרי שמרי משפט": "Blessed are those that guard the rules". PSALMI 106:3a, *Biblia Hebraica Stuttgartensia*, Deutsche Bibelgesellschaft:1997.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NICHOLAS P. TIDES and MATTHEW CRAIG NEUMANN, *Plaintiffs-Appellants,* v. THE BOEING COMPANY, *Defendant-Appellee.*	No. 10-35238 D.C. No. 2:08-cv-01601-JCC OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
April 15, 2011 – Seattle, Washington

Filed May 3, 2011

Before: Andrew J. Kleinfeld, A. Wallace Tashima, and Barry G. Silverman, Circuit Judges.

Opinion by Judge Silverman

COUNSEL

John T. Tollefsen (argued), Tollefsen Law PLLC, Lynnwood, Washington, for the plaintiffs-appellants.

Jonathan P. Harmon (argued), and Eric B. Martin, McGuire-Woods, LLP, Richmond, Virginia, for the defendant-appellee.

Stephen M. Kohn (argued), Kohn, Kohn & Colapinto, P.C., Washington, D.C., for amicus curiae the National Whistleblowers Center.

OPINION

SILVERMAN, Circuit Judge:

We hold today that by its express terms, the whistleblower provision of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A(a)(1), protects employees of publicly-traded companies who disclose certain types of information only to the three categories of recipients specifically enumerated in the Act – federal regulatory and law enforcement agencies, Congress, and employee supervisors. Leaks to the media are not protected.

I. BACKGROUND[1]

In January 2007, plaintiffs Matthew Neumann and Nicholas Tides began working as auditors in Boeing's IT Sarbanes-Oxley ("SOX") Audit group. Tides worked in St. Louis, and Neumann was based in Seattle. At the time, the IT SOX Audit group was one of two departments housed within Boeing's Corporate Audit organization. It was charged with

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[1] Because Tides and Neumann appeal from an order granting Boeing summary judgment, we set forth the relevant facts in the light most favorable to them. *See Chuang v. Univ. of Cal. Davis, Bd. of Tr.*, 225 F.3d 1115, 1120 n.3 (9th Cir. 2000).

helping the company comply with SOX's requirement that it annually assess the effectiveness of its internal controls and procedures for financial reporting. *See* 15 U.S.C. § 7262(a). Auditors in the IT SOX Audit group performed audits and testing on information technology controls.[2] The group was staffed with about ten Boeing employees, including Tides and Neumann, and supplemented by approximately seventy contract auditors from the accounting firm PriceWaterhouseCoopers. Deloitte & Touche served as Boeing's external auditor and was responsible for annually attesting to, and reporting on, the company's assessments of its internal controls, as required by SOX. *See id.* § 7262(b).

Tides and Neumann claim that tensions were high in the IT SOX Audit group upon their arrival in January 2007 because management feared that Deloitte & Touche might declare a "material weakness" in the company's internal controls. They allege that managers pressured IT SOX auditors to rate Boeing's internal controls as "effective" and fostered a generally hostile work environment. Beginning in February 2007, Tides and Neumann began separately expressing concerns about this perceived pressure and several deficiencies in Boeing's auditing practices

[2] An information technology ("IT") control is a policy or procedure implemented by a company to ensure the confidentiality and integrity of its IT functions, such as a procedure requiring the testing and approval of software before installation on a company computer.

that they viewed as potential violations of SOX. Their primary concern related to Boeing's use of PriceWaterhouseCoopers contractors in the internal auditing of the company's IT controls. Tides and Neumann repeatedly complained to management about the practice of giving the contractors managerial authority over Boeing employees, as well as the involvement of the contractors in both the design and audit of Boeing's internal controls. They also expressed concerns about the integrity of data stored in the software system Boeing used to record its IT SOX audit results. Both auditors believed that the system permitted unauthorized users to alter the ratings given to the company's internal controls.

At some point in late April 2007, Andrea James, a reporter with the *Seattle Post-Intelligencer*, left messages on Tides' and Neumann's work phones asking each of them to speak with her about an article she was writing on Boeing's compliance with SOX. Neither Tides nor Neumann immediately responded to her requests, hoping instead to resolve their concerns internally with the help of management and human resources. At the time, both were aware that Boeing had in place a policy that restricted the release of company information to the news media. Boeing's policy, PRO-3439, required employees to refer "[i]nquiries of any kind from the news media" to the communications department and also prohibited the release of company information without prior review by that department.

In late May 2007, James contacted Neumann again, this time showing up uninvited at his home with another *Post-Intelligencer* reporter. Neumann agreed to speak with them about Boeing's compliance with SOX. He described the pressure he felt to render positive audit results and detailed a recent meeting where he and other IT SOX auditors expressed concerns over the role of PriceWaterhouseCoopers contractors in audits of Boeing's internal controls. James asked Neumann if he knew of any examples of significant deficiencies in Boeing's internal controls going unreported or of any auditors being instructed to change their findings, but he said he didn't know of any specifics. Several days after their meeting, James emailed Neumann an excerpt of a draft of her article. Neumann responded that the excerpt looked good and sent James the text of an email that he and other IT SOX auditors recently received from a manager. The manager's email reminded employees that Boeing policy prohibited the release of information to the media without prior approval from the communications department.

Tides contacted James in July 2007 after receiving what he viewed as a negative and unsubstantiated performance evaluation for the second quarter of the year. He forwarded her a series of work-related emails from his Boeing computer. Most of the emails documented the concerns he previously raised with management and human resources regarding perceived problems with the IT SOX Audit group's auditing practices. Tides also forwarded James several

internal Boeing documents, including copies of the company's policies governing contract labor.

On July 17, 2007, the *Post-Intelligencer* published the article "Computer security faults put Boeing at risk," co-authored by James. The article reported that "[f]or the past three years, The Boeing Co. has failed, in both internal and external audits, to prove it can properly protect its computer systems against manipulation, theft and fraud." It detailed, among other things, a threatening company culture perceived by employees involved in SOX compliance, a record of poor internal audit results indicating that many of the company's computer system controls were failing, and an internal allegation that audit results were being manipulated.

At some point prior to the publication of the *Post-Intelligencer* article, Boeing caught on that several employees were likely releasing company information to the media. As a result, it authorized an investigation that included the monitoring of both Tides' and Neumann's work computers and email accounts. The investigation revealed that the two auditors were communicating with James without permission. Two months after the publication of the *Post-Intelligencer* article, Tides and Neumann were interviewed separately by HR investigators about their communications with James. Both admitted to speaking with her about Boeing's auditing practices and to providing her with company documents. After the interviews, Boeing suspended Tides and Neumann indefinitely. Their cases were then referred to an

Employee Corrective Action Review Board, a committee composed of five voting members and one non-voting ethics advisor to evaluate charges of employee misconduct. After reviewing the applicable Boeing policies and the investigative reports detailing the two auditors' contacts with the media, the Board unanimously voted to terminate Tides and Neumann effective September 28, 2007 and October 1, 2007, respectively. Both were later informed in writing that:

> It has been determined that you created an unacceptable liability for the Company. Specifically, you violated PRO-2227, Information Protection, by disclosing Boeing information[3] to non-Boeing persons without following appropriate procedures, obtaining necessary approvals and putting in place appropriate safeguards. In addition, you violated PRO-3439 by not referring inquiries from the news media to Communications, and by releasing information without approval in accordance with the requirements of said PRO. Your actions are aggravated by the fact that the information had an adverse effect on the Company's reputation and its relations with its employees, customers, shareholders, suppliers and other important constituents, causing significant liability. The Company deems your behavior in this incident as

[3] PRO-2227 defines "Boeing information" as "all non-public information that is owned by Boeing." Under the policy, "[a]ll Boeing information is presumed to have value and be proprietary, confidential, and/or trade secret information."

> unacceptable and in violation of its expectations as defined in PRO-1909.

Following their terminations, Neumann and Tides filed SOX whistleblower complaints with the Occupation Safety and Health Administration[4] on December 21, 2007 and December 26, 2007, respectively. After over nine months of delay, the agency issued letters acknowledging Tides and Neumann's right to proceed de novo in federal court.[5] Tides and Neumann filed separate complaints in district court, alleging that they were terminated in violation of 18 U.S.C. § 1514A(a)(1) for reporting violations of SOX and other securities laws. Their cases were later consolidated. Boeing moved for summary judgment. On February 9, 2010, the district court granted Boeing's motion. This timely appeal followed. We have jurisdiction to hear this case under 28 U.S.C. § 1291.

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[4] The Secretary of Labor has delegated responsibility for receiving and investigating whistleblower complaints to OSHA, an agency within the Department of Labor. *See Day v. Staples*, 555 F.3d 42, 53 n.4 (1st Cir. 2009); 29 C.F.R. § 1980.103(c).

[5] If the Secretary of Labor does not issue 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, then the claimant may seek de novo review in district court, which will have jurisdiction over the action regardless of the amount in controversy. 18 U.S.C. § 1514A(b)(1)(B); *see also Day*, 555 F.3d at 53 n.5.

II. STANDARD OF REVIEW

We review the district court's grant of summary judgment de novo. *Evanston Ins. Co. v. OEA, Inc.*, 566 F.3d 915, 918 (9th Cir. 2009). In doing so, "[w]e must determine, viewing the evidence in the light most favorable to [Tides and Neumann], whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law." *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004). We also review de novo questions of statutory interpretation. *Beeman v. TDI Managed Care Servs., Inc.*, 449 F.3d 1035, 1038 (9th Cir. 2006).

III. DISCUSSION

SOX's whistleblower provision, 18 U.S.C. § 1514A, protects employees of publicly-traded companies from discrimination in the terms and conditions of their employment when they take certain actions to report conduct that they reasonably believe constitutes certain types of fraud or securities violations. Section 1514A claims are governed by a burden-shifting procedure under which the plaintiff is first required to establish a prima facie case of retaliatory discrimination. *See id.* § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(2)(B)(i). To make out a prima facie case, the plaintiff must show that: (1) he engaged in protected activity or conduct; (2) his employer knew or suspected, actively or constructively, that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the

circumstances were sufficient to raise an inference that the protected activity was a contributing factor in the unfavorable action. *Van Asdale v. Int'l Game Tech*., 577 F.3d 989, 996 (9th Cir. 2009); 29 C.F.R. § 1980.104(b)(1)(i)-(iv). If the plaintiff meets his burden of establishing a prima facie case, then "the employer assumes the burden of demonstrating by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the plaintiff's protected activity." *Van Asdale*, 577 F.3d at 996.

The issue in this case comes down to whether the plaintiffs' disclosures to the *Post-Intelligencer* were protected under § 1514A(a)(1).[6] To answer that question, we turn to the statute's language to determine whether it has a plain meaning. *See McDonald v. Sun Oil Co.*, 548 F.3d 774, 780 (9th Cir. 2008). "The preeminent canon of statutory interpretation requires us to presume that [the] legislature says in a statute

[6] Amicus curiae the National Whistleblowers Center argues that disclosures to the media may also be protected under § 1514A(a)(2). We decline to address this argument. The plaintiffs brought their complaints under § 1514A(a)(1), and the district court did not explicitly address whether their disclosures were protected under § 1514A(a)(2). We generally do not review issues raised only by an amicus curiae. *See Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 n.1 (9th Cir. 1998). Nor will we review issues that are not raised in district court, absent special circumstances not present here. *See Int'l Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc*., 752 F.2d 1401, 1404 (9th Cir. 1985).

what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Id*. (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (internal citation and quotation marks omitted)). If the statutory language is ambiguous, however, then we may refer to legislative history to discern congressional intent. *United States v. Gallegos*, 613 F.3d 1211, 1214 (9th Cir. 2010). We may also look to other related statutes because "statutes dealing with similar subjects should be interpreted harmoniously." *United States v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008) (internal quotation marks omitted).

Section 1514A(a)(1) provides that:

> (a) No [publicly-traded company] . . . 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 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], 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).

18 U.S.C. § 1514A(a)(1).

The plaintiffs contend that their disclosures of perceived SOX violations to the *Post-Intelligencer* were protected under § 1514A(a)(1) because reports to the media may eventually "cause information to be provided" to members of Congress or federal law enforcement or regulatory agencies. We decline to adopt such a boundless interpretation of the statute. The plain language of § 1514A(a)(1) protects employees of public companies from retaliation only when they "provide information, cause information to be provided, or otherwise assist in an investigation" concerning specified types of fraud or securities violations "when the information or assistance is provided to or the investigation is conducted by" one of three individuals or entities: (1) a federal regulatory or law enforcement agency, (2) a member or committee of Congress, or (3) a supervisor or other individual who has the authority to investigate,

discover or terminate such misconduct. 18 U.S.C. § 1514A(a)(1). Members of the media are not included. If Congress wanted to protect reports to the media under § 1514A(a)(1), it could have listed the media as one of the entities to which protected reports may be made. Or, it could have protected "any disclosure" of specified information, as it did with the Whistleblower Protection Act, 5 U.S.C. § 2302. But it took neither course, opting instead to limit protected activity to employees who raise certain concerns of fraud or securities violations with those authorized or required to act on the information.

When Congress wants to protect the disclosure of any information to any entity, it knows how to do so. The Whistleblower Protection Act prohibits retaliation against government employees and job applicants for "*any* disclosure of information" that the employee or applicant reasonably believes constitutes "a violation of any law, rule, or regulation, or . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" as long as "such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. § 2302(b)(8) (emphasis added). Relying on this language, courts and administrative bodies have interpreted the Whistleblower Protection Act to protect government employees who expose wrongdoing to members of the press. *See, e.g., Horton v. Dep't of*

Navy, 66 F.3d 279, 282 (Fed. Cir. 1995); *Costin v. Dep't of Health & Human Servs.*, 72 M.S.P.R. 525, 536 (M.S.P.B. 1996). But the expansive language of that Act stands in stark contrast to the limiting text of § 1514A(a)(1). While the Whistleblower Protection Act protects "any disclosure" without limitation or qualification as to the specific types of entities to which protected whistleblower reports may be made, § 1514A(a)(1) is not so generous. This distinction lends further support to our conclusion that § 1514A(a)(1) does not protect employees of public companies who disclose information regarding fraud or certain securities violations to members of the media. *See White v. Lambert*, 370 F.3d 1002, 1011 (9th Cir. 2004), *overruled on other grounds by Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc) ("[W]hen Congress uses different text in 'adjacent' statutes, it intends that the different terms carry a different meaning.").

Construing § 1514A(a)(1) in the manner urged by the plaintiffs would essentially read the terms "a Federal regulatory agency or law enforcement agency" and "any Member of Congress or any committee of Congress" out of the statute. Such a result is one we must avoid, as "it is not within the judicial province to read out of the statute the requirement of its words." *Quarty v. United States*, 170 F.3d 961, 973 (9th Cir. 1999) (quoting *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 273 (1931)). If, as the plaintiffs contend, the disclosure of information to the media is protected on the ground that it may

ultimately fall into the hands of a member of Congress or a federal regulator, then virtually *any* disclosure to *any* person or entity would qualify as protected whistleblower activity, provided the information pertains to one of the statutorily-defined categories of unlawful conduct set forth in § 1514A(a)(1). We decline to afford such an expansive meaning to the statutory language.

Although we need not resort to the legislative history of § 1514A because the plain meaning of the statute is clear, *see United States v. Hall*, 617 F.3d 1161, 1167 (9th Cir. 2010), we can sleep well knowing that it reinforces our conclusion above. Section 1514A was passed in response to "a culture, supported by law, that discourage[d] employees from reporting fraudulent behavior not only to *the proper authorities*, such as the FBI and the SEC, but even internally." S. Rep. No. 107-146, at 5 (2002) (emphasis added); *see also Day*, 555 F.3d at 52. In its report discussing the scope of SOX's protections for whistleblowers, the Senate Judiciary Committee explained that the whistleblower provision was intended to protect "employees of publicly traded companies who report acts of fraud to federal officials *with the authority to remedy the wrongdoing* or to supervisors or appropriate individuals within their company." S. Rep. No. 107-146, at 18-19 (emphasis added). The Committee also clarified that SOX's whistleblower provision protects employees of public companies "when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators,

Congress, their supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent." *Id*. at 19. Each of these statements makes clear that, in enacting § 1514A(a)(1), Congress intended to protect disclosures only to individuals and entities with the capacity or authority to act effectively on the information provided. Nowhere in the Committee's report is there any indication that Congress intended § 1514A(a)(1) to be interpreted so broadly as to protect employee disclosures to members of the media.

In sum, the plain meaning of the statutory language excludes the expansive interpretation advanced by the plaintiffs. We therefore hold that § 1514A(a)(1) does not protect employees of publicly-held companies from retaliation when they disclose information regarding designated types of fraud or securities violations to members of the media. Though unnecessary to this result, the legislative history gives no reason to doubt that Congress said what it meant to say. Boeing was within its rights under § 1514A(a)(1) to terminate the plaintiffs for violating company policy prohibiting unauthorized disclosures of Boeing information to the media. Because the district court properly granted summary judgment on the ground that the plaintiffs' disclosures to the *Post-Intelligencer* did not fall within the scope of § 1514A(a)(1)'s protection, we need not address whether the disclosures "definitively and specifically" relate to one of the listed categories of fraud or

securities violations, *see Van Asdale*, 577 F.3d at 996-97, or whether there is any triable issue of fact as to whether Boeing's reason for terminating the plaintiffs was pretextual, *see id.* at 996.

AFFIRMED.

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NICHOLAS P. TIDES, Plaintiff, v. THE BOEING COMPANY, Defendant.	CASE NO. C08-1601-JCC *Consolidated with* *C08-1736-JCC* ORDER (Filed Feb. 9, 2010)
MATTHEW C. NEUMANN, Plaintiff, v. THE BOEING COMPANY, Defendant.	

This matter comes before the Court on Defendant's Motion for Summary Judgment (Dkt. No. 28), Plaintiffs' Response and Cross Motion for Partial Summary Judgment (Dkt. No. 30), Defendant's Reply (Dkt. No. 32), Defendant's Response (Dkt. No. 33), and Plaintiffs' Reply (Dkt. No. 34.) Having considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS Defendant's Motion for Summary Judgment and DENIES Plaintiffs' Cross Motion for Partial Summary Judgment.

I. BACKGROUND

Section 404 of the Sarbanes-Oxley Act of 2002 ("SOX"), 15 U.S.C. § 7262, requires publicly traded companies to assess the design and effectiveness of internal controls over financial reporting. In 2007, Boeing's Corporate Audit organization had two groups performing auditing and testing of these controls. (Def.'s Mot. 4 (Dkt. No. 28).) One group, Audit SOX Finance, performed audits and testing on financial-control groups. (*Id.*) The other group, Audit IT SOX, performed audits and testing on information-technology controls. (*Id.*) The Audit IT SOX group was staffed by Boeing employees and supplemented by contractors provided by the accounting firm PricewaterhouseCoopers ("PwC"). (*Id.*)

Nicholas P. Tides began working for Boeing in 2003 as an export compliance specialist. (Pl.'s Resp. 9 (Dkt. No. 30).) Matthew C. Neumann was hired by Boeing in 1997 and moved into auditing in 2004. Both men became Audit IT SOX auditors in January 2007. (*Id.* at 11.) During their employment, Tides and Neumann made several complaints to supervisors about perceived auditing deficiencies, but eventually came to the conclusion that Boeing's auditing culture was unethical and that the work environment was hostile to those who sought change. (*Id.* at 7.) Eventually, Tides and Neumann felt the situation was serious enough that they contacted Andrea James, a reporter from the Seattle Post-Intelligencer, and provided her with information and documents. (*Id.* at 9; Def.'s Mot. at 11 (Dkt. No. 28).) When Boeing became

aware of the contact and disclosures made to the reporter, Tides and Neumann were placed on suspension, and the matter was referred to a Boeing Employee Corrective Action Review Board ("ECARB"). (Def.'s Mot. 11 (Dkt. No. 28).) The ECARB convened on September 26, 2007, voted unanimously to terminate both Tides and Neumann, and informed the men of these decisions on September 28 and October 1, respectively. (*Id.* at 12.) Tides and Neumann filed whistleblower complaints with the Occupational Safety and Health Administration (OSHA) on December 26, 2007 and December 21, 2007, respectively. (*Id.*) After delays with OSHA, Plaintiffs decided to proceed in federal court. On October 8, 2008 and November 7, 2008, respectively, OSHA issued letters acknowledging Plaintiffs Tides and Neumann's right to proceed *de novo* in federal court.

II. APPLICABLE LAW

A. Summary Judgment Standard

Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to

that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

B. Whistleblower Protection Under SOX

Section 806 of SOX, 18 USC § 1514A(a)(1), prohibits employers of publicly traded companies from "discriminat[ing] against an employee in the terms and conditions of employment" for "provid[ing] information . . . regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." *See Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996 (9th Cir. 2009).

Section 1514A(b)(2) further specifies that § 1514A claims are governed by the procedures applicable to whistleblower claims brought under 49 U.S.C. § 42121(b). Section 42121(b)(2)(B), in turn, sets forth a burden-shifting procedure by which a plaintiff is first required to make out a *prima facie* case of retaliatory discrimination; if the plaintiff meets this burden, the employer assumes the burden of demonstrating by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the plaintiff's protected activity. *See id.*

III. ANALYSIS

The Court concludes first that SOX does not prohibit termination for disclosures to the media. Second, the Court finds that whether or not Tides and Neumann engaged in any activity protected by SOX, Boeing was entitled to terminate them for leaking confidential documents to the media. The Court finds that it need not consider whether Tides and Neumann have made a *prima facie* case. Boeing has shown by clear and convincing evidence that it would have terminated Tides and Neumann for their disclosures to the media even in the absence of activity that may have been protected.

A. Whistleblowing to the Media is not Protected Activity

Communications with the media are not protected by SOX. Section 806(1)(a) of SOX protects employees against retaliation from employers when the employee provides information or assistance 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)." 18 U.S.C. 1514(a)(1). Plaintiffs concede that this list is the most specific of all whistleblower-protection statutes, but asks the Court to read it expansively. (Pl.'s Resp. 29 n.126 (Dkt. No. 30).)

Plaintiffs seek to draw parallels to other statutes with more expansive whistleblower protection, but by the clear language of § 806, such comparisons are without merit. Plaintiff also refers to a letter from an OSHA investigator, which states "OSHA's position is that talking to the press is a protected activity under SOX. I also mentioned the *Overall* case as one source of authority to support OSHA's position. *See In the Matter of: Curtis C. Overall, Complainant v. Tennessee Valley Authority, Respondent*, ARB Case No. 04-073, ALJ Case No. 99-ERA-25, July 16 2007." (Pl.'s Resp. Ex. 1 (Dkt. No. 30).) The Case referenced in the letter deals with the Energy Reorganization Act, not SOX, and is also inapposite.

Congress has made clear that while SOX was intended to protect whistleblowers, only certain types of whistleblowing would be afforded protection. Leaking documents to the media is not one of them.

B. Plaintiffs Failed to Show Pretext

Tides and Neumann argue that Boeing's reliance on the media disclosures to fire them was merely a pretext, and that the firings actually occurred as a response to protected activity such as complaints to their supervisors. The stated grounds for their dismissal must have been pretext, Plaintiffs argue, because dissemination of information outside the company is permitted by Boeing corporate policies. (Pl.'s Resp. 33-34 (Dkt. No. 30).) Boeing Procedure 3439 states: "Nothing in this procedure should be construed as preventing employees from: 1. Discussing

or releasing information about wages, hours, working conditions, or other terms and conditions of employment to the extent privileged by Section 7 of the National Labor Relations Act or other law." (Pl.'s Resp. Ex. 2 (Dkt. No. 30).)

Boeing's position is that unauthorized media leaks are a violation of confidentiality rules, and are not privileged by the NLRA. Boeing maintains a set of policies and procedures governing the sharing of company information with outsiders. (Def.'s Mot. 10 (Dkt. No. 28).) Boeing claims that Tides and Neumann were aware of these policies and were reminded of them in April 2007. (*Id.*)

First, the Court examines whether Tides and Neumann's disclosures were privileged by the NLRA. Section 7 of the NLRA states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3) of this title.

29 U.S.C. § 157. It is true that the hostile work environment described by Tides and Neumann could be

considered "working conditions." *See Ft. Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 645-46 (U.S. 1990) (quoting *Dep't of Def. Dependents Sch. v. FLRA*, 274 U.S. App. D.C. 299, 301, 863 F. 2d 988, 990 (1988) ("The term 'working conditions' ordinarily calls to mind the day-to-day circumstances under which an employee performs his or her job")). But Boeing policies only protect the release of information about working conditions to the extent privileged by Section 7. And this section relates exclusively to the formation of unions and the practice of collective bargaining. Tides and Neumann have offered no reason to believe that their statements and disclosures, allegedly related to fraud and a hostile work environment designed to conceal that fraud, should be protected by Section 7 of the NLRA. The Court finds that Boeing policies do not protect the disclosures made by Tides and Neumann.

Second, the Court examines whether Boeing's reasons for dismissal were pretextual. The Court looks to a similar case in the Ninth Circuit for instruction. In *Van Asdale*, 577 F.3d 989 (9th Cir. 2009), the plaintiffs were in-house intellectual-property attorneys for a gaming-machines company who had recently received high-level promotions. Shawn Van Asdale was fired for poor performance seventeen days after receiving an exceptional performance review. Lena Van Asdale was fired several weeks later for requesting sensitive company information. Three days prior to Shawn's termination, the Van Asdales mentioned to their supervisor that they suspected

securities fraud had occurred in a recent merger. The court held that a reasonable fact-finder could determine that the asserted grounds for dismissal were pretextual for four reasons: (1) the contrast between the employer's account of Shawn's poor performance and his record of promotions and excellent performance reviews; (2) the conclusory support for the employer's contention that Lena's requests were improper; (3) a complete lack of specific evidence supporting the employer's claims of poor performance; and (4) the close proximity of Shawn's firing to the alleged protected activity. *Id.* at 1004.

Tides and Neumann have not shown that Boeing's actions were similarly pretextual. The grounds for dismissal were not vague and unsupported as they were in *Van Asdale.* Tides and Neumann do not deny that they provided internal documents to a reporter; they merely claim that such actions are protected. The Court has found that they are not. Accordingly, Boeing has shown, by clear and convincing evidence, that Tides and Neumann would have been dismissed independently of any activity protected under SOX.

IV. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Defendant's Motion for Summary Judgment (Dkt. No. 28) and DENIES Plaintiffs' Cross Motion for Partial Summary Judgment (Dkt. No. 30). The Clerk is DIRECTED to close the case.

SO ORDERED this 9th day of February, 2010.

/s/ John C. Coughenour
John C. Coughenour
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICHOLAS P. TIDES; MATTHEW CRAIG NEUMANN, Plaintiffs-Appellants, v. THE BOEING COMPANY, Defendant-Appellee.	No. 10-35238 D.C. No. 2:08-cv-01601-JCC Western District of Washington, Seattle ORDER (Filed Jun. 9, 2011)

Before: KLEINFELD, TASHIMA, and SILVERMAN, Circuit Judges.

Judge Silverman has voted to reject appellants' petition for rehearing en banc and Judges Kleinfeld and Tashima so recommend.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

U.S. DEPARTMENT OF LABOR [SEAL]
Occupational Safety &
Health Administration
1111 Third Avenue, Suite 715
Seattle, Washington 98101-3212

Certified Mail
June 11, 2008

Mr. Russ Perisho
Perkins Coie
1201 Third Avenue, Ste. 4800
Seattle, WA 98101-3099

RE: [EX7C]
The Boeing Company/Tides/0-1960-08-015

Dear Mr. Perisho:

We received your letter and legal memorandum dated May 30, 2008. You began by incorrectly stating in the letter addressed to me that, "You have stated that OSHA intends to create a new form of protection for individuals who speak to reporters, even though press communications do not fall within the specific activities protected by Sarbanes Oxley." This is your statement and is absolutely not a statement that I made to you. I never said anything to you about OSHA intending to create a new form of protection.

I briefly explained to you that OSHA's position is that talking to the press is a protected activity under SOX. I also mentioned the Overall case as one source of authority to support OSHA's position. See *In the Matter of: Curtis C. Overall, Complainant v. Tennessee Valley Authority*, *Respondent*, ARB Case No. 04-073, ALJ Case No. 99-ERA-25, July 16, 2007. I noticed

that you did not mention this case in your 8 page memorandum. OSHA will consider your legal memorandum.

OSHA is trying to complete the investigation of Mr. Tides and [7C] mplaints. We already requested that Boeing produce the file concerning its internal investigation on Mr. Tides and [7C] copy of the interview of [7C] with [7C] nd the ethics file or investigation of [7C] complaints that he filed with [7C] . If not already produced in its entirety, OSHA requests the complete file from Boeing's Employment Correction Action Review Board ("ECARB") investigation and hearing on both Mr. Tides and [7C] and the investigation file on Carey Thesson's investigation of Mr. Tides' hostile work environmental complaint against Macy Moring.

If Boeing is concerned that some or all of the requested documents are confidential, I recommend that upon producing these documents that Boeing specify that they are confidential, mark them "confidential," and state in the response that the documents should be kept confidential, and why, to the greatest extent allowed by all applicable laws. Please refer to a relevant OSHA public policy that is in the form of a memorandum entitled, Revised Interim Guidelines on Changes in Procedures for Handling Privacy Act Files and Freedom of Information Act Requests dated April 11, 2006. This policy can be viewed at: http://www.osha.gov/dep/oia/whistleblower/Revised_interim_guidelines.html

If there is any documentation requested by OSHA since the beginning of these investigations that is not produced on or before June 25, 2008, OSHA will assume that Boeing has chosen not to produce any more documentation as part of this investigation of Mr. Tides and [EX7C] complaint.

If you have any questions, please do not hesitate to contact me at 206-553-5932, extension 8095, or at phelps.rebecca@dol.gov.

Sincerely,

/s/ Rebecca Phelps
Rebecca Phelps
Investigator