

# “What keeps you up at night?”

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## Lesson learned from 2011 – Whistleblower complaint survives without reference to specific statutes allegedly violated

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### SUMMARY

**A recent federal case clarifies that a whistleblower plaintiff under Sarbanes-Oxley need not communicate to his or her employer, nor delineate in his or her complaint, the specific section of SOX he or she believes was violated. Instead, the whistleblower plaintiff must have only "reasonably believed," and then must plead, that the conduct or problems identified constitute a violation of federal law barring fraud against shareholders.**

The question regarding how the new whistleblower provisions of the Dodd Frank Wall Street Reform Act will fare may be judged by a decision from the District Court for the Southern District of New York, *Sharkey v. J.P. Morgan Chase & Co.*, 2011 WL 3663401 (S.D.N.Y. Aug. 19, 2011). The district court held that a whistleblower plaintiff under Sarbanes-Oxley (SOX) need only plead that he or she had information that led to a reasonable belief that securities regulations or other federal anti-fraud provisions had been violated. In other words, in reporting the alleged violations to his or her employer and in filing a complaint under SOX, the whistleblower need not identify the specific statutes or code section alleged to have been violated.

The court's holding came as part of its opinion denying J.P. Morgan's motion to dismiss the plaintiff's complaint in *Sharkey*. The plaintiff, Jennifer Sharkey, a former employee of J.P. Morgan's Private Wealth Management Group, voiced concerns regarding a client's alleged involvement in illegal activities "including mail fraud, bank fraud and money laundering." Ms. Sharkey claimed she began an investigation of this Suspect Client and reported to her superiors at J.P. Morgan (also named defendants), on multiple occasions, her concerns regarding the client's alleged fraudulent and illegal activity. The complaint contained 12 paragraphs outlining Ms. Sharkey's beliefs regarding the Suspect Client's potential violations of SOX and 30 paragraphs outlining

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the factual basis for those beliefs. Ms. Sharkey alleged that she was dismissed from her job as vice president and wealth manager after she reported the Suspect Client's dubious activity.

The defendants challenged Ms. Sharkey's complaint on two bases. First, they alleged that the complaint presented new allegations, outside of those which had already been presented to OSHA, and therefore must be dismissed. While SOX grants statutory jurisdiction to federal courts over claims brought under its purview, those claims must first be presented to OSHA prior to the employee bringing any action in federal court. Here, the defendants argued, Ms. Sharkey asserted new allegations in her federal complaint, not included in her previously filed OSHA complaint. The court rejected this argument, finding that the relevant allegations were simply a more detailed recitation of the allegations contained in Ms. Sharkey's OSHA complaint and did not present any new claims. Importantly, the court noted, it is not whether "every fact forming the basis for the belief that gave rise to plaintiff's protected activity was previously administratively pled, but whether each separate and distinct claim was pled before the agency."

The defendants' motion to dismiss also claimed Ms. Sharkey's complaint was insufficient because it failed to allege the specific statutes she believed the Suspect Client was violating or had violated. However, the court held the complaint adequately pled that Ms. Sharkey formed a reasonable belief that the Suspect Client was engaged in one or more violations of the six enumerated categories of misconduct under SOX. Importantly, the court did not require Ms. Sharkey to specify which of the alleged actions by the Suspect Client she believed violated which of the six enumerated categories. Instead, it was sufficient that her "myriad" of allegations demonstrated a reasonable belief that the Suspect Client was engaged in violations of some or all of those categories.

Likewise, the defendants claimed the complaint was insufficient as to the element of "employer knowledge" because Ms. Sharkey's communications to her employer did not enumerate which section of SOX she believed the Suspect Client violated. The court, however, found that a whistleblower "need not cite a code section he believes was violated in his communication to his employer" but must only identify the specific conduct the employee believes to be illegal. The complaint here sufficiently established "employer knowl-

edge" because it delineated the multiple times Ms. Sharkey brought her concerns regarding illegal activity to the attention of her superiors, along with the detailed nature of those reports.

Based on *Sharkey*, a whistleblower plaintiff need not communicate to his or her employer, nor delineate in his or her complaint, the specific section of SOX he or she believes was violated. Instead, the whistleblower plaintiff must have only "reasonably believed," and then must plead, that the conduct or problems identified constitute a violation of federal law barring fraud against shareholders. The court's decision here strongly indicates the ongoing deference to whistleblower plaintiffs, particularly at the early stages of litigation. Employers should take note of this ongoing deference in dealing with matters that may fall under the whistleblower protections of SOX and ultimately Dodd-Frank.

To review the entire decision, please go to:

[http://info.saulnews.com/reaction/documents/Sharkey\\_v\\_JPMorgan\\_Aug2011\\_Opinion.pdf](http://info.saulnews.com/reaction/documents/Sharkey_v_JPMorgan_Aug2011_Opinion.pdf).

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