Lawson v. FMR LLC: The First Circuit Declines to Extend Sarbanes-Oxley Whistleblower Protection to Employees of Private Company Contractors to Public Companies

In a case of first impression, the United States Court of Appeals for the First Circuit issued a decision in *Lawson* v. *FMR LLC*, holding that the whistleblower protection provision of Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX") covers only employees of "public" companies – those with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 ("Exchange Act") or those required to file reports under Section 15(d) of the Exchange Act – and does not extend its coverage to employees of private companies that are contractors or subcontractors to those public companies.[1] The First Circuit, which reversed a decision of the United States District Court for the District of Massachusetts, reached its conclusion on the basis of statutory interpretation of the whistleblower provision and other sections of SOX and bolstered it with an examination of legislative history.

I. Facts and Procedural History

The *Lawson* case involved two plaintiffs, both of whom initiated lawsuits against their respective former employers, which are private companies that contract to provide investment management services to the Fidelity family of mutual funds – mutual funds organized under the Investment Company Act of 1940 that file reports under Section 15(d) of the Exchange Act. Although the two lawsuits were filed separately, the district court addressed both in a single order, since they shared a common defendant and raised the same question regarding the scope of the whistleblower protection provision of Section 806 of SOX, codified at 18 U.S.C. §1514A.

Plaintiff Jonathan M. Zang, who had been employed by Fidelity Management & Research Co. and later by FMR Co., Inc., a subsidiary of Fidelity Management & Research Co., was terminated from his employment and filed a complaint with the Occupational Health and Safety Administration ("OSHA") of the Department of Labor ("DOL") on the basis of §1514A. Zang alleged that he had been terminated "in retaliation for raising concerns about inaccuracies in a draft revised registration statement for certain Fidelity funds. Zang alleged that he reasonably believed these inaccuracies violated several federal securities laws."[2] OSHA dismissed Zang's complaint, and Zang requested a hearing before an Administrative Law Judge ("ALJ"). The ALJ found that Zang was not a covered employee under §1514A and granted summary decision for the defendants. Zang petitioned for review of the ALJ's decision by the DOL's Administrative Review Board, but terminated his appeal upon deciding to file his complaint in the district court.

Plaintiff Jackie Hosang Lawson was employed by Fidelity Brokerage Services, LLC, a private subsidiary of FMR Corp. (which was succeeded by FMR LLC) and filed an OSHA complaint against her employer and its parent pursuant to §1514A while she was still employed, alleging retaliation against her for raising concerns regarding cost accounting methodologies. She later resigned, claiming she had been constructively discharged. A year after filing, Lawson, upon notifying OSHA that she intended to seek review of her claim in federal court, filed a complaint against her employers in the district court.

---

[1] *See Lawson* v. *FMR LLC*, No. 10-2240 (1st Cir. Feb. 3, 2012), available at http://www.ca1.uscourts.gov/pdf.opinions/10-2240P-01A.pdf.

[2] *Id*. at 5.

The defendants, which are private companies, filed motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing in part that the plaintiffs were not covered employees under §1514A. The district court denied the defendants' motions to dismiss, finding that whistleblower protection under §1514A extends to employees of private contractors and subcontractors to public companies. The dispositive issue of the applicability of §1514A to the plaintiffs in the action reached the First Circuit via interlocutory appeal.

II. The First Circuit's Decision

The First Circuit reversed the district court's decision, holding that only employees of public companies are protected by §1514A.

A. Statutory Construction

In reaching its decision that the whistleblower protection afforded by §1514A does not extend beyond employees of public companies, the Court relied primarily on SOX's language. Section 1514A(a) provides, in relevant part: "No company with a class of securities registered under section 12" of the Exchange Act, "or that is required to file reports under section 15(d) of" the Exchange Act, "or any officer, employee, contractor, subcontractor, or any agent of such 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 . . . ."[3] The Court settled the ambiguity surrounding the term "employee" in the statute in favor of the defendants, concluding that "only the employees of the defined public companies are covered by these whistleblower provisions; the clause 'officer, employee, contractor, subcontractor, or agent of such company' goes to who is prohibited from retaliating or discriminating, not to who is a covered employee."[4] The Court opined that the text of §1514A first identifies covered employers – "public" companies – which "may not retaliate against their own employees who engage in protected activity" and then lists representatives of such employers, including contractors and subcontractors, who are also prohibited from "retaliating against employees of the covered public-company employer who engage in protected activity."[5]

The Court further noted that both the title of SOX Section 806, within which §1514A is found, and the caption of §1514A(a) shed light on the meaning of the term "employee" in §1514A. Section 806 is titled "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud" and subpart (a) of §1514A contains the caption "Whistleblower protection for employees of publicly traded companies." The Court reasoned that the fact that both the title and the caption contain the phrase "employees of publicly traded companies" indicates that §1514A applies only to "employees of publicly traded companies."[6]

As additional evidence of the fact that Congress intended §1514A to provide limited whistleblower protection, the Court referenced other provisions of SOX illustrating that where Congress wanted to enact broader whistleblower protection, it did so explicitly. Section 1107 of SOX, for example, is entitled "Retaliation Against Informants" and "requires neither a public company, nor an employment relationship, nor a securities law violation to trigger coverage."[7] By comparison, the text of §1514A is "conspicuously narrow."[8] Similarly, the

[3] *Id*. at 10-11 (citing 18 U.S.C. §1514A(a)) (quotations omitted).

[4] *Id*. at 16.

[5] *Id*. at 17.

[6] *Id*. at 19.

[7] *Id*. at 22. Section 1107 reads: "Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under

Court observed that "in other portions of SOX, where Congress intended separate provisions of the Act to apply to employees of private entities, it said so explicitly."[9] This is evident in the provisions that "directly and explicitly regulate the activities of entities other than publicly traded companies" and in the express formation of different regulatory schemes depending on the persons or entities involved.[10] Thus, the Court reasoned, if "Congress intended to extend §1514A whistleblower coverage protections to the employees of private companies that have contracts to provide investment advice to funds organized under the Investment Company Act, it would have done so explicitly"; however, the language of §1514A as well as its caption and title indicate that Congress did not intend its coverage to extend beyond employees of public companies.[11]

B. Legislative History

The First Circuit confirmed its understanding of the text of the §1514A through an examination of legislative history. The Court noted that the Senate committee report for a bill containing what became §1514A reflects that "Congress's primary concern was the Enron debacle, which involved the stock of a highly visible publicly traded company" and contains several references to "whistleblower protection to employees of publicly traded companies."[12] Likewise, the Congressional record contains statements of Senator Leahy, a sponsor of that bill, that the provision ultimately codified as §1514A "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud."[13] The Court also supported its holding by referencing post-enactment legislative activity. In particular, the Court reasoned that the fact that Congress amended §1514A in 2010 via the Dodd-Frank Wall Street Reform and Consumer Protection Act "by explicitly extending whistleblower coverage to employees of public companies' subsidiaries and employees of statistical rating organizations" indicates that Congress's understanding of §1514A comports with that of the Court.

III. The Dissenting Opinion

According to the dissenting opinion, the plain language of §1514A does not limit the provision's application to employees of public companies. The dissent reasoned that "boiling the statute down to its relevant syntactic elements, it provides that 'no . . . contractor . . . may discharge . . . an employee'" without limiting the term "employee."[14] The dissent further noted that the title and caption of the whistleblower protection provision "do not compel a limited reading of its language" and that "nothing in the legislative history of Sarbanes-Oxley indicates congressional intent to limit whistleblower protection to employees of public companies."[15]

---

this title or imprisoned not more than 10 years, or both." *Id*. (citing SOX §1107, 116 Stat. at 810).

[8] *Id*.

[9] *Id*. at 23.

[10] *Id*.

[11] *Id*. at 24, 26-27. Although the Court's "reading of §1514A stands on the text of SOX itself," the Court further supported its interpretation by contrasting the language of §1514A with that of "two other, earlier, federal whistleblower protection statutes which explicitly extend coverage to employees of contractors to the entities regulated by those statutes." *Id*. at 30-31. The fact that Congress explicitly extended coverage to employees of contractors in those instances confirmed the Court's understanding that the coverage of §1514A(a) is more limited.

[12] *Id*. at 36-37 (citations and quotations omitted).

[13] *Id*. at 37 (citations and quotations omitted).

[14] *Id*. at 53 (dissenting opinion).

[15] *Id*. at 57-58 (dissenting opinion).

IV. Significance of the Decision

As the first court of appeals to decide the issue, the First Circuit in *Lawson* found the whistleblower protection afforded by §1514A to be limited to employees of the public companies referenced in the provision. Having reached this decision, the Court left it up to Congress to amend the statute if indeed it had intended the term "employee" in §1514A to encompass employees of private-company contractors to public companies as well.

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Yafit Cohn at 212.701.3089 or ycohn@cahill.com.