SCOTUS: *Lawson, et al.* v. *FMR LLC, et al.*: SOX Whistleblower Protections Cover Employees of Private Contractors of Public Companies

In *Lawson, et al.* v. *FMR LLC, et al.*, the Supreme Court of the United States held that the anti-retaliation whistleblower protections of the Sarbanes-Oxley Act of 2002 apply to employees of privately held contractors where the contractor performs work for a public company.[1] This means that a private firm contracting with a public company is subject to a federal court action if it discharges or otherwise discriminates against *its own* employee because the employee reported that the public company violated certain provisions of federal law.

I. Background and procedural history

Jackie Hosang Lawson and Jonathan M. Zang each worked for private investment management companies that provided services to Fidelity mutual funds.[2] Lawson alleged that she was retaliated against, and constructively discharged in 2007, because she raised concerns about certain cost accounting methodologies that she believed overstated expenses associated with operating mutual funds. Zang alleged his employment was terminated in 2005 because he raised concerns about inaccuracies in a draft SEC registration statement concerning certain Fidelity funds.

Plaintiffs sought relief in federal court under 18 U.S.C. § 1514A(a), alleging they were discharged from their employment because they engaged in whistleblowing activity protected by Sarbanes-Oxley. At the times relevant to this action, the statute provided that no public company,[3] "or any . . . contractor . . . may discharge, demote . . . or in any other manner discriminate against an employee . . . because of [protected whistleblowing activity]."[4] The protected whistleblowing activity under § 1514A(a) includes reporting certain conduct to any supervisor, federal regulatory or law enforcement agency, or Congress. The statute covers the reporting of "any conduct which the employee reasonably believes constitutes a violation" of the federal mail fraud, wire fraud, bank fraud, or securities and commodities fraud statutes.[5] Additionally, it covers the reporting of conduct reasonably believed to violate any rule or regulation promulgated by the Securities and Exchange Commission, or "any provision of Federal law relating to fraud against shareholders."[6]

Plaintiffs alleged that their private employers violated the statute by retaliating against them for protected whistleblowing activities. Plaintiffs argued that the statute prohibits private companies that are contractors for public companies from discharging or discriminating against *the contractors' own* employees for engaging in protected activity, and that the statute thus covers them because their private employers were contractors of Fidelity mutual funds, which are public companies. Defendants moved to dismiss, arguing that the plaintiffs are not covered by the statute because the statute prohibits contractors from discharging or discriminating against *the public company's* employees, not *its own* employees. The United States District Court for the District of

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[1] *Lawson, et al.* v. *FMR LLC, et al.*, No. 12–3, slip op. at 7 (March 4, 2014), *available at* http://www.supremecourt.gov/opinions/13pdf/12-3_4f57.pdf.

[2] Zang and Lawson worked for subsidiaries of defendant FMR for eight and 14 years, respectively. The subsidiaries provided management and distribution services to FMR's Fidelity mutual funds.

[3] This memorandum adopts the shorthand used by the Supreme Court, which used the term "public company" when referring to the statute's inclusion both of companies with a class of securities registered under § 12 of the Securities Exchange Act of 1934, and of companies required to file reports under § 15(d) of that Act. *See, e.g.*, *Lawson*, slip op. at 7–8.

[4] §1514A(a) (2006 ed.).

[5] §1514A(a)(1) (2006 ed.) (citing 18 U.S.C. §§ 1341, 1343, 1344, 1348).

[6] *Id.*

Massachusetts denied defendants' motions to dismiss, holding that the plaintiffs were covered employees.[7] Defendants moved for an interlocutory appeal on the question of whether § 1514A(a) applies to employees of private contractors of public companies, and the district court certified the question to the First Circuit.[8]

A divided panel of the First Circuit reversed the decision of the District Court, holding that the statute protects "an employee" *only of a public company*, not an employee of a private contractor working for the public company.[9] Judge Thompson dissented from the Court of Appeals' decision, arguing that statute "does not limit its coverage to 'an employee of a publicly held company,'" and that "it just refers broadly to 'an employee.'"[10]

II. SCOTUS rules Sarbanes-Oxley whistleblower protections apply to employees of private contractors working for public companies

The Supreme Court, in an opinion by Justice Ginsburg, reversed the Court of Appeals.[11] The Court held that the plain text of the statutory provision, given its ordinary meaning, refers to the *contractor's own* employees.[12] Quoting Judge Thompson's dissent from the Court of Appeals judgment, the Court reduced § 1514A(a) to its "relevant syntactic elements," which provide that "no . . . contractor . . . may discharge . . . an employee."[13] The Court rejected Respondents' argument that the Court should read the words "of a public company" into the provision following "an employee."[14] "The ordinary meaning of 'an employee' in this proscription is the contractor's own employee."[15]

Justice Ginsburg's opinion noted that the Court of Appeals' construction would render § 1514A(a) essentially inapplicable to mutual funds, which are almost all structured so that they have no employees of their own and are managed by private contractors.[16] "[I]f the whistle is to be blown on fraud detrimental to mutual fund investors, the whistleblowing employee must be on another company's payroll, most likely, the payroll of the mutual fund's investment adviser or manager."[17]

In reaching its conclusion, the Supreme Court rejected several textual and policy arguments in favor of limiting the scope of the provision to employees of public companies. First, the Court rejected the argument that the statute must be read narrowly in order to avoid the "absurd result of extending protection to the personal employees of company officers and employees."[18] Second, the Court also refused to construe the provision

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[7] *Lawson*, slip op. at 8.

[8] *Lawson, et al.* v. *FMR LLC, et al.*, 670 F.3d 61, 65 (1st Cir. 2012).

[9] *Id.* at 68.

[10] *Id.* at 84 (Thompson, J., dissenting) (internal citation omitted).

[11] *Lawson*, No. 12–3, slip op. at 2. The Court reversed the First Circuit by a vote of 6-3. Although Justices Scalia and Thomas concurred in the judgment, differences in their reasoning raise questions about the implications of the decision, discussed *infra* Part III.

[12] *Id.* at 9.

[13] *Id.* (quoting 670 F.3d at 84).

[14] *Id.* at 9–10.

[15] *Id.* at 9.

[16] *Id.* at 16–19.

[17] *Id.* at 2.

[18] *Id.* at 14.

narrowly based on its statutory headings.[19] Third, Justice Ginsburg's opinion rejected the Court of Appeals' contention that the legislative history supported a narrow construction that would protect only employees of public companies.[20]

III. Significance of the decision

The *Lawson* decision establishes that employees of *private* contractors working for public companies are entitled to the whistleblower protections of § 1514A where the employees report certain potential violations of law related to the contractor's relationship with the public company.

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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.

[19] *Id.* at 15–16.

[20] *Id.* at 16–19. Justice Scalia and Justice Thomas did not join in this portion of Justice Ginsburg's opinion.