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Supreme Court Expands Whistleblower Protection To Employees Of Private Companies

By Bruce A. Truex and Ryan J. Koss

The United States Supreme Court expanded whistleblower protection to include the employees of private contractors and subcontractors of public companies in an opinion authored by Justice Ginsburg. The Court held in *Lawson v. FMR, LLC*, No. 12-3, 571 U.S. --- (March 4, 2014) that the former employees of a private company that contracted to advise and manage Fidelity mutual funds were protected by the Sarbanes-Oxley Act.

The Sarbanes-Oxley Act of 2002 was enacted to protect people who disclose fraud, but the Act is particularly concerned with employees that possess knowledge of fraudulent behavior that occurred within a public company. The Act was designed to encourage employees with knowledge of fraud to come forward, and protects those employees when they do come forward with information. Those employees are "whistleblowers".

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Lawson reflects an important change in law for any private company that contracts or subcontracts to provide services to publicly held companies. Private companies should be careful when dealing with employee reports of fraudulent behavior on the part of the public company it contracts with. Any adverse action taken by the private contractor that could be construed as retaliation with respect to the whistleblower may result in civil liability for the private company. If an employee learns of a public company's fraud, he or she is encouraged to disclose that information and will be protected, regardless of whether he or she is an employee of the public company or the private contractor hired by the public company.

The former employees received protection after they suffered retaliation and ultimate discharge from their employer FMR, the private contractor of the mutual funds, when they blew the whistle on fraud that was detrimental to the mutual fund. The mutual funds were public companies that did not have any employees, but instead retained outside firms like FMR for management and other advisement. FMR argued that whistleblower protection only extended to the employees of public companies, "i.e., companies that either have 'a class of securities registered under section 12 of the Securities Exchange Act of 1934,' or that are 'required to file reports under section 15(d)' of that Act." The Court disagreed and determined that the text of the statute providing whistleblower protection did not support FMR's narrow statutory construction.

The Sarbanes-Oxley Act was a response to corporate and accounting scandals like the 2001 Enron scandal, which, at the time, resulted in the largest bankruptcy in United States history. The Act's goal was to "prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions." The Act provides that "[n]o [public] company . . . , or any officer, employee, contractor, subcontractor, or 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 [whistle blowing or other protected activity]." 18 U.S.C. §1514A(a).

The Court held that the Act literally states that "no . . . contractor . . . may . . . discriminate against [its own] employee [for whistle blowing]." Also, the Court found that holding a private contractor or subcontractor liable for retaliation

comports with the text of the rest of the act. "The prohibited retaliatory measures listed in § 1514A(a)'s list – discharge, demotion, suspension, threats, harassment, or discrimination in the terms and conditions of employment – are commonly actions an employer takes against its own employees." The Court determined that since contractors would not normally take these actions against a public company's employees, the Act must be read to mean that employees of contractors and subcontractors are included in the Act's protections. Any other interpretation of section 1514A(a) would render the term 'contractor' unnecessary in the list of actors.

FMR argued that 'contractor' was included in the list of actors to prevent public companies from hiring an outside contracting firm to do their dirty work. FMR proposed the example of George Clooney's character in the movie "Up in the Air," who was hired by companies to be the bearer of bad news: hired simply to fire a company's employees. FMR contended that the term 'contractor' was included in the list under section 1514A(a) so that public companies cannot hire contractors to fire employees for retaliatory reasons as a way of escaping liability under Sarbanes-Oxley. The Court was not persuaded by FMR's hip and tantalizing use of pop culture. Rather, the Court held that Congress had a much broader goal in mind by placing 'contractors' in the list of actors in the Sarbanes-Oxley Act.

The Court was particularly concerned that public companies like mutual funds have no employees. This concerned the Court because the employees of private contractors to public companies like mutual funds will be susceptible to retaliation if the employee uncovers fraud, even when the fraud is perpetuated by the contractor the employee works for. Ultimately, the Court held that all of the textual arguments presented by FMR and the dissent (authored by Justice Sotomayor) were unpersuasive. The goal of Sarbanes-Oxley was to protect employees when they uncover fraud, and to prevent future cataclysmic corporate disasters like Enron.

The Court established that the Sarbanes-Oxley Act of 2002 was going to be interpreted broadly and in light of its goal: to prevent and punish fraud. Prior to *Lawson*, employees that were improperly retaliated against would only receive whistleblower protection when they were the employees of the public company that took the retaliatory action. After *Lawson*, outside contracting employees like investment advisers, lawyers or accountants may be protected if they uncover fraud.

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