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First Circuit Holds That Section 806 of the Sarbanes-Oxley Act Extends Only to Employees of Public Companies, Not Employees of Private Companies Who Are Contractors or Subcontractors for Covered Public Companies

February 15, 2012 by John Stigi and Sean Kirby

In Lawson v. FMR LLC, No. 10-2240, 2012 U.S. App. LEXIS 2085 (1st Cir. Feb. 3, 2012), the United States Court of Appeals for the First Circuit, in a case of first impression, held that the whistleblower provision in Section 806 of Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("SOX"), applies only to employees of public companies, and does not protect employees of private companies who are contractors or subcontractors for the covered public company. This decision, the first decision by a United States Court of Appeals on this issue, helps clarify the definition of "covered employee" under whistleblower provisions of SOX.

Plaintiffs Jackie Hosang Lawson and Jonathan M. Zang each brought separate actions in which they alleged unlawful retaliation by their employers in violation of the whistleblower protections of Section 806 of SOX. Section 806(a) of SOX provides, in relevant part, that "[n]o company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 . . . 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 any lawful act done by the employee . . . . "

The employers of Lawson and Zang were each private companies that provided advising or management services by contract to the Fidelity family of mutual funds. Lawson's and Zang's employers each moved to dismiss the claims arguing, in part, that the plaintiffs were not "covered employees" within the meaning of Section 806. The United States District Court for the District of Massachusetts denied the motions, ruling that the SOX whistleblower protection of Section 806 extended to employees of private agents, contractors and subcontractors to public companies. Defendants moved for an interlocutory appeal and the district court certified a "controlling question of law" to the First Circuit.

On appeal, the First Circuit limited its review to the question certified by the district court: "Does the whistleblower protection afforded by Section 806(a) of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, apply to an employee of a contractor or subcontractor of a public company, when that employee reports activity which he or she reasonably believes may constitute a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348." Upon reviewing the language and legislative history of the statute, the First Circuit concluded that the

whistleblower protections of Section 806(a) do not extend to an employee of a contractor or subcontractor and, accordingly, reversed the holding of the district court.

In reaching its conclusion, the First Circuit scrutinized the language and legislative history of the statute to determine the true intent of Congress. Initially, the First Circuit looked to the plain language of the statute. Given the language of the statute, the Court held that the "more natural reading" of the statute is that "only employees of the defined public companies are covered by this whistleblower provision . . . [because] the clause officer, employee, contractor, subcontractor or agent of such company goes to who is prohibited from retaliating or discriminating, not who is a covered employee . . . ."

Next, the First Circuit held that the title and caption of Section 806 also supported its finding. The caption of Section 806 is titled "Protection for Employees of Publicly Traded Companies who Provide Evidence of Fraud" while the caption of Section 806(a) is titled "Whistleblower protection for employees of publicly traded companies." Based upon the plain language of these captions, the First Circuit held that only employees of publicly traded companies are protected by the whistleblower provision in the statute. Similarly, the First Circuit also noted that Congress enacted other whistleblower protections in SOX which are broader than the provisions included in Section 806(a), thereby evidencing an intent to keep the scope of the statute narrow. For instance, 18 U.S.C. § 1513, which concerns retaliation against informants, "requires neither a public company, nor an employment relationship, nor a securities law violation to trigger coverage . . . [whereas] [t]he scope of § 1514A is, by contrast, conspicuously narrow."

Finally, the First Circuit held that the legislative history of Section 806(a) confirms that it does not apply to employees of private companies. Specifically, the First Circuit noted that the statute was amended in 2010 to explicitly extend whistleblower coverage to employees of public companies' subsidiaries and nothing in the reports of the Senate committee indicates that Congress intended to extend the protections of the statute to employees of contractors and subcontractors of publicly traded companies.

In light of the First Circuit's ruling, the definition of the term "covered employee" has been clarified and the group of persons potentially covered by the protections of Section 806(a) have been significantly narrowed to include only employees of publicly traded companies — not employees of contractors and subcontractors who provide services to the publicly traded companies.

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