

August 28, 2013

High Court's Decision Next Term May Increase Sarbanes-Oxley Whistleblower Litigation

This November, in *Lawson v. FMR LLC*,¹ the United States Supreme Court will hear argument on whether “whistleblowers” employed by a privately held contractor or subcontractor of a publicly traded company are protected from retaliation by the Sarbanes-Oxley Act of 2002 (SOX). The Court granted certiorari in *Lawson* on May 20, 2013, to review the judgment of the U.S. Court of Appeals for the First Circuit in a case involving two self-proclaimed whistleblowers employed by private contractors performing services for publicly traded mutual funds.

The plaintiffs in *Lawson* claimed that they had been retaliated against for raising concerns about potential violations of the securities laws in connection with the operation of the publicly traded funds.² To ground their claims, the plaintiffs invoked the protection of 18 U.S.C. § 1514A(a), a SOX provision stating that no publicly traded company “or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment” because of certain lawful whistleblowing activities.

After the district court denied the defendant employers’ motion to dismiss on the ground that SOX does not protect the employees of privately held companies from retaliation, the First Circuit reversed. In a split decision, the First Circuit thus held that the term “employee,” within the meaning of § 1514A, covers only employees of public companies,³ and not the employees of their private contractors.⁴

Only a few months later, the Administrative Review Board (ARB) of the Department of Labor reached the opposite conclusion in *In re Thomas Spinner v. David Landau & Associates, LLC*.⁵ Specifically, the ARB held that a private contractor’s employees enjoy anti-retaliation protection under SOX whenever the contractor provides services for a publicly traded company. Moreover, to highlight its disagreement with the First Circuit, the ARB emphatically stated in *Spinner* that “[t]he First Circuit’s *Lawson* holding is not controlling in this case, and we decline to adopt it”⁶

¹ 670 F.3d 61 (1st Cir. 2003), *cert. granted*, 133 S. Ct. 2387 (2013).

² *Id.* at 63.

³ The 2010 amendments to SOX contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act extended anti-retaliation protection under SOX to the employees of any subsidiary or affiliate whose financial information is included in the consolidated financial statements of a publicly traded company. See 18 U.S.C. § 1514A(a). Because *Lawson* involved employees of a private contractor rather than a true subsidiary, the Dodd-Frank amendments do not govern the case’s outcome.

⁴ 670 F.3d at 68.

⁵ 2012 WL 2073374, at *3 (May 31, 2012).

⁶ *Id.* at *4.

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Further highlighting the significance of the First Circuit's disagreement with the ARB is the U.S. Solicitor General's recent decision to file an amicus brief supporting the *Lawson* plaintiffs. In his brief, the Solicitor General urged the Court to hold that SOX's anti-retaliation provision covers the employees of contractors providing services for public companies.⁷ The Solicitor General further argued that the ARB's decision in *Spinner* is entitled to *Chevron* deference⁸ and that the obvious intent of § 1514A was to cover the employees of private contractors like Arthur Andersen, which played a key role in the fraud at Enron in the early 2000s.⁹

If the Supreme Court agrees with the *Lawson* plaintiffs and the Solicitor General, its decision could dramatically expand the scope of coverage for "whistleblowers" under SOX — and expose many companies that are not publicly traded to employee claims for retaliation. A decision in favor of the defendants, on the other hand, could bring greater certainty to employers that are assessing their exposure to liability under SOX for adverse employment actions.



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⁷ Brief for the United States as Amicus Curiae Supporting Petitioners, *Lawson v. FMR LLC*, No. 12-3, 2013 WL 4049264 (Aug. 7, 2013).

⁸ See generally *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁹ *Id.* at *25.