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Labor & Employment / FCGMA Alert - Supreme Court Opens A Pandora's Box Of Whistleblower Litigation

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On Tuesday, the Supreme Court opened the door to a potential wave of whistleblower litigation under the Sarbanes-Oxley Act's anti-retaliation provision, with its surprising 6-3 decision in *Lawson v. FMR LLC*. Whether the Court's decision creates a tsunami of future retaliation lawsuits may depend on the imagination of plaintiffs' lawyers. However, the Supreme Court's dissent (penned by Justice Sotomayor) predicts that even the housekeeper of a public company employee could now claim retaliation if that public company employee fires the housekeeper because of something arguably related to a fraud, whether committed by, or against, the public company, or someone else. Thus, regardless of its ultimate breadth, Lawson unquestionably has created more questions, and more litigation, than it resolved.

In *Lawson*, the Supreme Court construed Sarbanes-Oxley's whistleblower protection provision, 18 U.S.C. §1514A, which (at the time) stated the following:

No [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 [whistleblowing or other protected activity].

The parties asked the Court whether Section 1514A protected only employees of public companies or whether it also protected employees of private contractors and subcontractors, like law firms, accounting firms, or investment advisors, who worked for public companies. This question was not confusing the appellate courts. To the contrary, since Enron and WorldCom imploded and Congress enacted SOX in 2002, no appellate court had addressed this issue before the First Circuit's decision in *Lawson*. The lack of developed law, let alone disagreements, on this topic caused even the Department of Labor to argue that Lawson was not worth the Court's time. Nonetheless, the Court heard the case, and, in a fractured opinion, concluded that Section 1514A applied to employees of private contractors and subcontractors of public companies and even the employees of those companies' officers and employees.

The original complaints in Lawson were filed by Jackie Lawson and Jonathan Zang, two employees of private companies that contract to advise Fidelity mutual funds. Mutual funds typically do not actually have employees, even though they are public companies. Instead, those performing work for a mutual fund are employed by the fund's privately held investment adviser or manager. According to Lawson and Zang, they complained about accounting practices at a Fidelity fund or

representations made in a Fidelity disclosure document. They each reported these problems internally and to the SEC and, in response, were fired or constructively discharged. Each then filed a whistleblower complaint with the Department of Labor and OSHA. When their complaints were not resolved within the statutorily prescribed 180-days, they sued. When their case reached the First Circuit, the court (over a dissent) concluded that it was "clear" that Section 1514A did not cover their claims because they worked for private companies.

A majority of the Supreme Court disagreed, concluding that the language actually "unambiguously" covered their claims. Justice Ginsburg wrote for the majority, joined by the Chief Justice, and Justices Breyer and Kagan. Justices Scalia and Thomas joined that opinion, but concurred separately, disavowing any discussion of congressional intent. Justice Sotomayor, with Justices Kennedy and Alito, dissented and, in language soon to be repeated in Lawson's aftermath, decried the "stunning reach" of the decision and predicted future Sarbanes-Oxley claims brought by babysitters against Wal-Mart greeters, and janitorial workers suing their employers who contract to clean the local Starbucks.

The majority justified its analysis (which largely tracks the DOL and SEC's position) on several levels. First, it examined Section 1514A's language, which it distilled to "no . . . contractor . . . may discharge . . . an employee." It reected adding the clause, "of a public company" presumed by Fidelity and the dissent, and instead the majority read the Section to apply to employees of the contractor. The majority presumed that a contractor would most often take adverse action against its own employees, not the employees of the public company. (The majority doubted that Congress intended to address "ax-wielding specialist[s]" like George Clooney's globe-trotting character in Up in the Air.). Section 1514A's procedures, which equate the employee's employer with the subject of the OSHA investigation, and its remedies, including reinstatement and back pay, reinforced that it must be the private company's employees that were protected.

Second, the majority focused on the environment that produced SOX. In Enron's aftermath, Congress was acutely aware that third-party gatekeepers, like Enron's accountants, lawyers, and investment advisors, either kept quiet or, if they raised concerns about Enron's activities, faced retaliation, including discharge by their employers. Excluding those professionals, the Court said, would create a "huge hole" in SOX's whistleblower protection scheme for the individuals theoretically most able to detect and halt fraud.

Third, the majority noted that, because mutual funds are governed by SOX but typically lack employees themselves, interpreting Section 1514A to apply only to employees of public companies leaves the employees of the funds' affiliated private entities without whistleblower protection.

Justice Sotomayor's dissent took issue with the majority's entire analysis, questioning how the majority found any clarity in the "deeply ambiguous" statutory text. But, she focused her concern on the potentially "absurd" ramifications of the opinion's "stunning" breadth. According to the dissent, the majority allows babysitters, gardeners, and housekeepers of employees of public companies, or even employees of private contractors for public companies, who report arguably fraudulent conduct by the public company, against the public company, or even by or against the

contractor's other private clients, to claim retaliation if that reporting adversely affects their employment. The dissent questioned whether Congress could possibly have meant to subject millions individuals and businesses to litigation over fraud reports that have no connection with, or impact on, public company shareholders.

The majority did not dispute the dissent's view of the opinion's reach. Instead, it simply called it "more theoretical than real" and predicted that "[f]ew housekeepers or gardeners . . . are likely to come upon and comprehend evidence of their employer's complicity in fraud."

Whether future courts, or Congress, will try to cabin Lawson's reach is unclear. The majority acknowledged the breadth of its decision and refused to limit its interpretation. Instead, the Court was satisfied that Lawson itself fell "squarely within Congress' aim" and left it to future litigants and lawsuits to apply it to other scenarios. Because not even the DOL had interpreted Section 1514A as broadly as the Lawson majority now has, how many whistleblowers, employed by both public and private companies, will now bring retaliation claims under SOX truly is anyone's guess.

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