SUPREME COURT EXTENDS PROTECTION TO WHISTLEBLOWERS
By: Joette S. Doran

In *Lawson v. FMR LLC*, Case No. 12-3, the United States Supreme Court held that the Sarbanes-Oxley Act (SOX) of 2002 provides whistleblower protections for employees of private contractors performing work for public companies. Following the shareholder fraud that brought down Enron, Congress sought to prevent that type of fraud in the future by including a provision in SOX that protects employees who report fraud or other violations of securities laws from retaliation by their employers.

Until *Lawson*, all federal courts interpreting SOX have found that its whistleblower protections applied only to employees of public companies. The *Lawson* decision rejects that interpretation in favor of a more liberal reading of the statute and more expansive application of the law. Section 806 of the Sarbanes-Oxley Act, codified at 18 U.S.C. § 1514A, provides:

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 any lawful act done by the employee—

"(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [various criminal statutes], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by [a federal agency, Congress, or supervisor] . . . ."

The plaintiffs, Jackie Lawson and Jonathan Zang, brought a lawsuit against their former employer, FMR LLC, a subcontractor of Fidelity Investments (Fidelity), alleging that the company unlawfully fired them in retaliation for filing complaints. Both Lawson and Zang told the Occupational Health and Safety Administration (OSHA) that they believed that Fidelity had violated certain rules and regulations set forth by both the Security and Exchange Commission (SEC) and federal laws relating to fraud against shareholders. After filing these complaints, Zang was terminated for unsatisfactory performance. Lawson filed several retaliation claims against her employer with OSHA and resigned in 2007, claiming that she had been constructively discharged.

Zang and Lawson filed separate actions against their former employers in district court alleging that the defendants violated "whistleblower" protection sections of SOX by taking retaliatory actions against them. The district court found in favor of the plaintiffs and held that the whistleblower provisions extended to employees of private agents, contractors, and subcontractors to public companies and that the plaintiffs had engaged in protected activity under the statute. The defendants appealed to the U.S. Court of Appeals for the First Circuit, which reversed the decision. Based on the Congressional intent and the plain meaning of the statute,

the Court of Appeals held that the plaintiffs were not protected employees under the Act. The Supreme Court granted certiorari and reversed.

Writing for the majority, Justice Ginsburg held that § 1514A's "whistleblower protection extends to employees of contractors and subcontractors," reversed the judgment of the First Circuit, and remanded. Basing her decision on the text, context and legislative history of § 1514A, Ginsburg found "that the provision shelters employees of private contractors and subcontractors." Influential too was the interpretation of another statute, 49 U.S.C. § 42121, which was parallel and which § 1514A was written to "track ... as closely as possible."

In a concurring opinion, Justice Scalia was joined by Justice Thomas and stated that he concurred in principal part to the majority opinion, and in the judgment. His main objection with the majority opinion was Justice Ginsburg's "occasional excursions beyond the interpretative terra firma of text and context, into the swamps of legislative history."

In a dissenting opinion, Justice Sotomayor was joined by Justices Kennedy and Alito, where she disagreed with the "stunning reach" the majority opinion gave § 1514A. According to the dissent, the majority's reading would open the door for babysitters to sue their employers, a scenario that the majority opinion characterized as "more theoretical than real."

It is questionable whether the expansion of § 1514A will have a meaningful impact, though it is expected that *Lawson* ruling coupled with the Securities and Exchange Commission's Whistleblower bounty program will reinforce the recent trend toward a higher volume of whistleblower reports and claims of retaliation. Privately held companies that perform work as contractors for public companies may want to review their policies to ensure that there are safeguards against whistleblower retaliation. Employers also should train their managers, supervisors and human resources professionals to avoid the risk of a whistleblower retaliation claim under §1514A.

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