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Supreme Court Extends Whistleblower Protections to Employees at Private Firms

By Christopher F. Robertson and Lauren J. Regis

Yesterday, a divided (6-3) Supreme Court ruled that the Sarbanes-Oxley Act's whistleblower protection includes employees of a public company's private contractors and subcontractors.

The whistleblower protection of the Sarbanes-Oxley Act of 2002 is codified in § 1514A, which states 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 [whistleblowing or other protected activity]." (emphasis added) § 1514A(a) (2006 ed.).

In *Lawson v. FMR LLC et al.*, Case No. 12-3, 571 U.S. ___ (March 4, 2014), the Supreme Court reversed the First Circuit to hold that this provision shields employees of *privately* held contractors and subcontractors.

Petitioners, a senior director of finance and a portfolio manager respectively, brought separate proceedings against their former employer, Fidelity Brokerage Services, LLC ("FMR"), a privately held company that provides advisory and management services to the Fidelity family of mutual funds. Although Fidelity's mutual funds are public companies (within the ambit of § 1514A(a)) and are required to file reports with the SEC, management services are provided by private companies under contract with the funds, including Fidelity Brokerage Services LLC.

Petitioners claimed that they were terminated in retaliation for raising concerns about FMR's management of mutual funds. The United States District Court for the District of Massachusetts denied FMR's motion to dismiss on the grounds that § 1514A protects contractors of public companies, and Petitioners, as employees of a private subcontractor, were protected.

On appeal, a divided panel of the First Circuit reversed. The Court of Appeals acknowledged that FMR is a "contractor" within the meaning of § 1514A, and therefore prohibited from retaliating against "an employee" who engages in protected activity. The majority agreed with FMR, however, that the term "employee" within the provision refers only to employees of public companies and does not cover a contractor's own employees.

The Supreme Court disagreed. In the majority opinion, Justice Ruth Bader Ginsburg wrote that the "mischief to which Congress was responding" when it enacted the Sarbanes-Oxley law made it clear that the protections should extend to subcontractors, including investment advisers. The Court reasoned that to hold otherwise would insulate "the entire mutual fund industry from § 1514A," a result that the Court concluded Congress did not intend. Justice Ginsberg, joined by three other Justices, also suggested that employees of law firms and accounting firms are within the statute's reach, noting that

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“outside professionals bear significant responsibility for reporting fraud by public companies with whom they contract,” and citing examples of retaliation against analysts and accountants in connection with Enron. If accepted by the lower courts, this represents a sweeping expansion of the coverage of the statute to a new class of professional employees.

Justice Sotomayor, joined by Justices Kennedy and Alito, dissented, fearing that the majority’s interpretation gives the law “a stunning reach.” Now, wrote Justice Sotomayor, “individuals and private businesses” are subjected to litigation over fraud reporting that in no way furthers Congress’ goal of protecting “the interests of public company shareholders.”

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