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Supreme Court Holds SOX Whistleblower Provisions Apply to Public Company's Private Contractors and Subcontractors

Yesterday, the U.S. Supreme Court held, in a 6-3 decision?- its first regarding a Sarbanes-Oxley (SOX) whistleblower case?- that SOX's anti-retaliation provision covers employees of a public company's private contractors and subcontractors.

This case was brought by two former employees of FMR LLC, a private company that contracted to advise and manage Fidelity Investment's mutual funds. As is typical in the mutual fund industry, although the mutual fund itself is a public company, it is operated and managed by employees of a separate private company. In this matter, plaintiffs, who were employees of the private company, alleged that they engaged in whistleblowing after discovering putative fraud relating to the mutual funds, and that they were thereafter retaliated against and discharged. Each plaintiff then commenced a retaliation claim against FMR (but not against the mutual funds) pursuant to SOX's whistleblower protections.

The SOX provision at issue before the Court states: "No [public] company . . ., or any . . . contractor [or] subcontractor . . . of such company, may discharge, demote, suspend, threaten, harass, or . . . discriminate against an employee in the terms and conditions of employment because of [whistleblowing activity]." 18 U.S.C. ?1514A(a). Justice Ruth Bader Ginsburg, delivering the opinion of the Court, found that the ordinary meaning of this provision's language supports the holding that the anti-retaliation provision of SOX covers employees of a public company's private contractors and subcontractors. Justice Ginsburg also noted that the Court's reading supports SOX's goal to prevent another Enron situation and avoids shielding the whole of the mutual fund industry (which primarily relies on contractors and not employees). The majority opinion also asserts that the Court's decision will not lead to a tidal wave of SOX whistleblower lawsuits, which is disputed by the dissent.

Given the Court's decision in this case, employers that are privately held companies, but which contract to provide services to public companies, must be aware that SOX's whistleblower protections now extend to their employees to the extent such employees provide services to public companies. Such whistleblowing may include providing information or assisting an investigation regarding conduct that an employee reasonably believes constitutes mail fraud, wire fraud, bank fraud, securities or commodities fraud, a violation of any U.S. Securities and Exchange Commission rule or regulation, or any other provision of federal law relating to fraud against shareholders. If an employee engages in such protected activity, he or she is shielded from retaliation, including discharge, demotion, suspension, threats, harassment, or any other discrimination in the terms and conditions of that individual's employment. Accordingly, for an employer to take an adverse action against a whistleblower, it must have a legitimate business reason for doing so that is unrelated to the employee's whistleblowing conduct. The Court's decision does not change this legal requirement, but it does broaden the scope of its application.

The case name is *Lawson v. FMR LLC et al.*, case number 12-3 at the United States Supreme Court.