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UNITED STATES SUPREME COURT EXPANDS THE REACH OF SARBANNES-OXLEY ACT BY HOLDING THAT SOME EMPLOYEES OF PRIVATE EMPLOYERS MAY ALSO BRING WHISTLEBLOWER CLAIMS UNDER THE LAW

On March 4, 2014, a divided United States Supreme Court held that the anti-retaliation protection provided to whistleblowers by the Sarbanes-Oxley Act of 2002, applies to employees of private companies that contract with public companies. The Court overturned a decision of the United States Court of Appeals in Boston that had followed other federal courts of appeal in previously holding that Sarbanes-Oxley only applied to employees of public companies. This decision has possible ramifications for all companies that do business with a publicly traded company.

The Sarbanes-Oxley Act (SOX) is a Wall Street reform law passed in 2002. Congress created SOX to set standards for all U.S. publicly traded company boards, management and public accounting firms and implemented new financial and conflict of interest disclosure requirements and greater corporate and criminal fraud accountability for public companies.

Justice Ginsburg, writing for the majority, said that allowing employees of private contractors to bring whistleblower lawsuits against their own employers under SOX is consistent with the statute's purpose of preventing "another Enron debacle" that stemmed from the culture of silence within corporations. According to the Court, it is appropriate to provide the protection of SOX to the employees of private contractors if those employees happen to witness inappropriate conduct at a publicly traded company. The three dissenting justices said the ruling had a "stunning reach" that could give protection to household employees like babysitters and gardeners.

In the case that the Supreme Court decided, Lawson v FMR LLC, two of Fidelity Investment's employees alleged that their related Fidelity employers retaliated against them for reporting questionable accounting practices and fraud. Jackie Lawson and Jonathan Zang brought the suits against their former employer for the retribution they each claimed that they experienced

after they raised concerns about suspected wrongdoing.

Lawson, who worked at Fidelity Investments for nine years, stated that she alerted supervisors to problems, including alleged improper accounting practices and was subsequently passed over for a promotion and threatened with punishment for insubordination. Zang ran several Fidelity mutual funds from 1998 to 2005 and claimed that they gave him poor reviews and then fired him in retaliation for his complaint. He had claimed that Fidelity portfolio managers inaccurately and illegally described how pay was calculated. As part of their suit, the former employees claimed that they were eligible for Sarbanes-Oxley protection because FMR, the parent company of Fidelity Investments, owns various investment companies that file reports with the Securities and Exchange Commission.

The private companies filed a motion to dismiss, arguing that they were not covered under the whistleblower provision because they were not public companies and merely contracted with the covered entity. Although the District Court agreed with Lawson and Zang's position that they could bring a claim under SOX against their privately held companies, the Court of Appeals reversed, finding that the District Court's definition was too broad.

In reversing the Court of Appeals, the Supreme Court held that the statutory language of the Act, "shelters employees of private contractors and subcontractors, just as it shelters employees of the public company served by the contractors and subcontractors." They also addressed the "Up in the Air" hypothetical situation based on the George Clooney movie, and posited that Congress included contractors in the statute to avoid allowing public companies to escape SOX liability by hiring a George Clooney-type character to deliver the bad news.

Because there are a number of laws that provide employees with the right to assert a whistleblower claim, the addition of one more whistleblower law to a Plaintiff's lawyer's arsenal will not necessarily result in a great increase of lawsuits against employers. It does, however, mean that private companies have greater accountability than they may have previously thought. The expansion of the Sarbanes-Oxley whistleblower provision adds one more statute which private employers must also now monitor.