SUTHERLAND

LEGAL ALERT

February 21, 2012

First Circuit Ruling Limits Whistleblower Protection Under Section 1514A(a) of the Sarbanes-Oxley Act to Employees of Public Companies

As a matter of first impression, the United States Court of Appeals for the First Circuit recently considered whether § 1514A(a) of the Sarbanes-Oxley Act (SOX) applies to those employed by a contractor or subcontractor of a public company. In *Lawson v. FMR LLC*, the First Circuit concluded that "only the employees of the defined public companies are covered by these whistleblower provisions…" – and not the employees of a contractor or subcontractor of that public company.[1] Click here for the opinion.

In *Lawson*, the plaintiffs sued their former employers, which were private companies that provided advisory or management services by contract to a publicly traded company. Plaintiff Zang was discharged after raising concerns about inaccuracies in a registration statement for certain Fidelity funds. As a result, Zang filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging unlawful retaliation under § 1514A(a) of SOX. OSHA dismissed Zang's complaint finding that he was a covered employee within the meaning of § 1514A(a) and was "covered" by the whistleblower protections, but that he had not engaged in protected activity under that subsection. On appeal, the Administrative Law Judge (ALJ) dismissed the action finding that Zang was not a covered employee under § 1514A(a). Zang appealed the ALJ's decision in federal court.

Plaintiff Lawson filed a similar complaint with OSHA while she was still employed and alleged that she was retaliated against for raising concerns about cost accounting methodologies. Thereafter, she resigned and claimed that she was constructively discharged. Before OSHA could rule on her claims, Lawson informed OSHA that she would seek review of her SOX claim in federal court. Although both plaintiffs filed separate complaints with OSHA and in federal court, the district court addressed both cases in a single order because the two claims shared a common defendant and raised the same question of law under § 1514A(a).

In district court, the defendants filed motions to dismiss arguing that plaintiffs were not covered employees, and in the alternative, that plaintiffs had not engaged in protected activity. The district court denied the motion to the dismiss, reasoning that § 1514A(a) extended coverage to employees of private agents, contractors and subcontractors to public companies, and plaintiffs had adequately plead facts in support of their retaliation claims.[2] The defendants moved for an interlocutory appeal on the issue of whether § 1514A(a) was applicable to plaintiffs.

In a 2-1 decision, the First Circuit reversed the district court's decision and remanded the case to the district court with instructions to dismiss the actions. In reversing the ruling, the court concluded that § 1514A(a) was enacted "to ensure an employee of a public company is covered under the provision if he or she were harassed by officers, other employees, or contractors or subcontractors to the public company for reporting fraud in that public company."[3] In arriving at this conclusion, the court first examined the statutory construction of the § 1514A(a). Specifically the court looked to the title of § 806,

---

[1] No. 10-2240, 2012 WL 335647, at * 5 (1st Cir. February 3, 2012).

[2] *Lawson*, 724 F. Supp.2d 141, 163-65, *rev'd in part*, 2012 WL 335647, at * 5.

[3] 2012 WL 335647, at * 6.

which is entitled "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud." The court found that "[f]rom that alone, it would be odd to read § 1514A(a) as covering employees of private companies."[4] Furthermore, the court found "[i]t unlikely Congress intended the term 'Civil action to protect against retaliation in fraud cases' in the heading of § 1514A(a) to be broader than the terms of 'Protection' discussed in the title of section 806."[5] The court also looked to other provisions of SOX to determine the intent of Congress. By way of comparison, the court ultimately concluded that Congress intended to "set up different regulatory schemes, which varied with the persons or entities involved."[6]

The court also compared § 1514A(a) with two other federal whistleblower protection statutes – the Nuclear Whistleblower Protection provision of the Energy Reorganization Act,[7] and the Pipeline Safety Improvement Act of 2002,[8] both of which expressly protect employees of contractors to entities regulated by these statutes. Accordingly, the court relied on "the fact that Congress was not similarly explicit in extending coverage to the employees of contractors, subcontractors and agents in § 1514A(a) as evidence that Congress did not intend such coverage to exist."[9]

In addition to analyzing the statutory construction of SOX, the court looked to the legislative history of § 1514A. In particular, the court considered the Senate Judiciary Committee report for the bill[10] containing what became § 1514A. The committee report provided that § 1514A "would provide whistleblower protection to employees of publicly traded companies."[11] The legislative history discussed by the court only further substantiated its narrow reading of § 1514A(a).

Finally, the court considered the 2010 Dodd-Frank amendment to § 1514A(a), which explicitly extended whistleblower coverage to employees of public companies' subsidiaries and employees of statistical rating organizations.[12] The court contrasted the Dodd-Frank amendment to § 1514A(a) with the failed Senate bill entitled the Mutual Fund Reform Act of 2004, which would have extended coverage under SOX to employees of investment advisers to mutual funds. In short, the court concluded that "these later actions by Congress are entitled to some weight as an expression of Congress's understanding of § 1514A(a)'s meaning, which is consistent with our interpretation."[13]

Because the First Circuit is the first appellate court weighing in on this issue, employers and their counsel should watch with interest for new developments in this area of the law.

---

[4] *Id*.

[5] *Id*.

[6] *Id*. at * 8.

[7] 42 U.S.C. § 5851(a)(1).

[8] 49 U.S.C. § 60129(a)(1).

[9] 2012 WL 335647, at * 12.

[10] The Corporate and Criminal Fraud Accountability Act of 2002, S. Rep. No. 107-146, at 2-5, 107th Cong., 2d Session 19 (2002), was incorporated into SOX as Title VIII and contained the provision that would become § 1514A.

[11] 2012 WL 335647, at * 14 (quoting S.Rep. No. 107-146, at 2-5 (2002)).

[12] 18 U.S.C. §1514A(a), *as amended by* Pub. L. No. 111-203 §§ 992(b), 929A (2010).

[13] 2012 WL 335647, at * 16.

■ ■ ■

If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Thomas R. Bundy III	202.383.0716	thomas.bundy@sutherland.com
Peter N. Farley	404.853.8187	peter.farley@sutherland.com
Allegra J. Lawrence-Hardy	404.853.8497	allegra.lawrence-hardy@sutherland.com
Jade A. Logan	404.853.8120	jade.logan@sutherland.com