No. 10-2240

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JACKIE HOSANG LAWSON; JONATHAN M. ZANG,

Plaintiffs-Appellees/Cross-Appellants

v.

FMR LLC, f/k/a FMR Corp.; FMR CO., INC.; FMR CORP., d/b/a Fidelity Investments; FMR LLC, d/b/a Fidelity Investments; FIDELITY BROKERAGE SERVICES, LLC, d/b/a Fidelity Investments; FIDELITY MANAGEMENT & RESEARCH COMPANY,

Defendants-Appellants/Cross-Appellees.

On Interlocutory Appeal from the United States District Court
For the District of Massachusetts

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS SUPPORTING AFFIRMANCE

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Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiffs-Appellees/Cross-Appellants Jackie Hosang Lawson and Jonathan M. Zang ("Lawson and Zang"), two former employees of non-public companies in the mutual fund industry who allege that they were subjected to retaliation in violation of section 806 of the Sarbanes-Oxley Act of 2002 ("SOX" or "Sarbanes-Oxley"), Pub. L. No. 107-204, tit. VIII, 116 Stat. 745, 802 (2002) (codified at 18 U.S.C. 1514A), after they

complained of improper business practices by their employers. The district court correctly held that section 806, the employee protection ("whistleblower") provision of SOX, covers employees of contractors or subcontractors of a public company. Accordingly, the court properly denied defendants-appellants' motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).[1]

INTEREST OF THE SECRETARY OF LABOR

The Secretary, who is responsible for the administration and enforcement of section 806, has a compelling interest in ensuring that the scope of section 806's coverage is interpreted correctly. See 18 U.S.C. 1514A(a).[2] The ability of employees of contractors and subcontractors of public companies to invoke section 806 is important to whistleblower protection. In enacting SOX, Congress recognized that employees are more likely

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[1] The district court also concluded that whistleblower protection is limited to complaints "relating to fraud against shareholders." The plain language of section 806 does not support that conclusion. In any event, it is unnecessary for this Court to decide this issue, as Lawson's and Zang's protected activity involved allegations of violations of Securities and Exchange Commission regulations and federal law relating to fraud against shareholders.

[2] The Secretary has delegated responsibility for administering the SOX whistleblower program to the Assistant Secretary for Occupational Safety and Health. See Secretary's Order No. 5-2007, 72 Fed. Reg. 31,160 (June 5, 2007); see also 29 C.F.R. 1980.103-.105.

to report securities law violations and fraud against shareholders if the law protects them from a corporate culture that punishes whistleblowers. An adverse decision by this Court would leave a significant number of employees who are in a position to blow the whistle on corporate fraud – including the great majority of employees in the mutual fund industry – without protection for disclosing information about federal securities law violations or shareholder fraud. Such a result would have a chilling effect on an employee of a contractor or subcontractor of a public company who might consider coming forward with information about corporate fraud or Securities and Exchange Commission ("SEC") violations. The resulting gap in whistleblower protection would undermine the purpose of the Sarbanes-Oxley Act.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that the whistleblower protection afforded by section 806(a) of SOX covers an employee of a contractor or subcontractor of a public company, when that employee reports activity which he or she reasonably believes may constitute a violation of 18 U.S.C. 1341, 1343, 1344, or 1348; any rule or regulation of the Securities and Exchange Commission; or any provision of federal law relating to fraud against shareholders.

2. Whether whistleblower protection under section 806(a) of SOX is limited to complaints relating to fraud against shareholders.

STATEMENT OF THE CASE

A. Statement of Facts and Course of Proceedings

1. Appellee Lawson is a former employee of FMR LLC, FMR Corp., and Fidelity Brokerage Services, LLC ("Fidelity Brokerage") who alleges that she was constructively discharged from her position as Senior Director of Finance at Fidelity Brokerage in September 2007 in retaliation for engaging in activity protected under section 806. See Lawson v. FMR LLC, 724 F. Supp. 2d 141, 144-46 (D. Mass. 2010). Specifically, Lawson claims that she was subjected to a series of retaliatory actions after she reported several allegedly wrongful accounting and fee practices, including the retention of fees in violation of SEC Rule 12b.1, 17 C.F.R. 270.12b-1(b). Lawson, 724 F. Supp. 2d at 145-46.

Appellee Zang is a former employee of Fidelity Management and Research Company ("Fidelity Management"), FMR Co., Inc., and FMR LLC who alleges that his employment as a portfolio manager for several Fidelity funds was terminated in retaliation for his protected activity under SOX section 806. Lawson, 724 F. Supp. 2d at 146-47. Zang alleges that he was terminated after informing Fidelity Management of conflicts of interest that

harmed the Fidelity mutual funds' shareholders and of errors in SEC-required disclosures. Id. at 147.

The defendants-appellants are nonpublic companies involved in the business of providing investment advice to mutual funds. Lawson, 724 F. Supp. 2d at 144. These companies' business includes acting as investment advisers to the Fidelity family of mutual funds ("Funds"), which includes providing management and administrative services to the Funds pursuant to contracts approved by the Funds' Board of Trustees. The Funds, which are separate investment companies under the Investment Company Act of 1940, 15 U.S.C. 80a-3(a)(1), are publicly held companies that are overseen by a Board of Trustees. Lawson, 724 F. Supp. 2d at 144-45. The Funds have no employees of their own. Id. at 144.

2. Lawson filed SOX whistleblower complaints with the Occupational Safety and Health Administration ("OSHA") of the Department of Labor ("Department" or "DOL") on December 20, 2006 and April 24, September 14, and November 9, 2007. Lawson, 724 F. Supp. 2d at 146. Zang filed a SOX whistleblower complaint with OSHA on September 15, 2005. Id. at 147. Both Lawson and Zang proceeded to federal district court pursuant to section 806(b)(1)(B) of SOX before a final determination was made by the

Secretary on their administrative claims.[3] See 18 U.S.C. 1514A(b)(1)(B).

The defendants-appellants moved to dismiss the complaints pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court addressed the complaints jointly because both complaints share a common defendant, FMR LLC, and raise the same issue concerning the scope of SOX section 806(a). Lawson, 724 F. Supp. 2d at 144.

B. The District Court's Decision

On March 31, 2010, the district court denied the motions to dismiss, finding that Lawson and Zang, as employees of investment advisers to mutual funds, are protected by section 806. Lawson, 724 F. Supp. 2d at 162. In so doing, the court concluded that SOX section 806(a) protects not only employees of public companies, but also employees of such companies' contractors, subcontractors, and agents. Id. at 163.

In analyzing the scope of whistleblower coverage, the district court began with the text of section 806, which provides in pertinent part:

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[3] Lawson filed suit in federal court prior to any determination on her administrative whistleblower complaint. Zang terminated proceedings before the Department and proceeded to federal court after an Administrative Law Judge dismissed his administrative whistleblower complaint. Lawson, 724 F. Supp. 2d at 146, 148.

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) . . ., 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.

18 U.S.C. 1514A(a) (quoted in Lawson, 724 F. Supp. 2d at 152). The district court considered whether the term "an employee" is limited to employees of public companies, or whether it also encompasses employees of any "contractor, subcontractor, or agent" of a public company. 724 F. Supp. 2d at 152-56. After analyzing the statutory text and considering pertinent judicial and DOL administrative decisions, the district court concluded that the term "an employee" is ambiguous. Id. at 156. The district court therefore considered the legislative history of section 806, which it also found inconclusive because the congressional debates did not speak directly to whether employees of nonpublic companies are covered by section 806. Id. at 157-58.

The court next considered the remedial purpose of SOX – to prevent and punish corporate fraud – and concluded that it supports coverage of employees of contractors and subcontractors working with a public company. Lawson, 724 F. Supp. 2d at 158-60. In particular, the court relied upon legislative history

indicating that "Congress was concerned with failures to report instances of fraud against shareholders, both by employees of public companies and by employees of those institutions working with the public company." Id. at 160. The court concluded that "Congress was concerned about the related entities of a public company becoming involved in performing or disguising fraudulent activity, and wanted to protect employees of such entities who attempt to report such activity." Id. Based on this evidence of Congressional intent, coupled with the conclusion that it was "plausible" to interpret the text of section 806(a) to protect employees of contractors, subcontractors, and agents of public companies, the court concluded that section 806 protected such employees. Id. at 161. In the mutual fund industry specifically, the court noted, investment advisers manage the daily operations of the mutual fund, which has no employees of its own. "If Section 806 only protected employees of public companies, then any reporting of fraud involving a mutual fund's shareholders would go unprotected." Id. at 162.

The court, however, was concerned that this construction of the statute might extend whistleblower protection to any employee of a private entity that acts as a contractor, subcontractor, or agent of a public company, even when the employee's whistleblowing does not directly involve fraud against shareholders. Lawson, 724 F. Supp. 2d at 158. The

court sought to avoid such an expansive interpretation of section 806 by limiting coverage to an employee who brings a complaint "relating to fraud against shareholders." Id. at 158-59.

On July 28, 2010, the district court certified the issue of SOX's applicability to employees of contractors and subcontractors of publicly traded companies, because "the challenged draftsmanship of the Sarbanes-Oxley Act has provided substantial ground within which to stake out different opinions regarding statutory intent" concerning the scope of section 806's coverage. Mem. and Order on pet. for interlocutory review ("Mem and Order"), at 4.[4] On August 9, 2010, the defendants-appellants filed a petition for interlocutory appeal with this Court. Lawson and Zang filed cross-petitions for interlocutory

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[4] The specific question certified for interlocutory review pursuant to 28 U.S.C. 1292(b) is:

> Does the whistleblower protection afforded by Section 806(a) of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, apply to an employee of a contractor or subcontractor of a public company, when that employee reports activity which he reasonably believes may constitute a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348; any rule or regulation of the Securities and Exchange Commission; or any provision of Federal law and such a violation would relate to fraud against shareholders of the public company?

Mem. and Order, at 4-5.

appeal on August 23, 2010. On October 25, 2010, this Court granted the petitions.

SUMMARY OF ARGUMENT

The district court correctly concluded that SOX section 806 provides whistleblower protection to an employee of a public company's contractor or subcontractor. Section 806(a) prohibits a public company or "any officer, employee, contractor, subcontractor, or agent of such company" from discriminating against "an employee" who engages in protected activity. This statutory language does not limit the term "an employee" to employees of public companies. Rather, the text of section 806 is most logically interpreted to provide whistleblower protection to "an employee" of any of the categories of entities that are prohibited from engaging in retaliation, including contractors and subcontractors. This interpretation is consistent with SOX's legislative history and broad remedial purpose, as well as with Department of Labor procedural regulations implementing section 806. A contrary interpretation would leave a significant number of employees who are in a position to expose corporate fraud – including employees in the mutual fund industry – without whistleblower protection under section 806.

The district court also concluded that an employee of a public company or its contractors or subcontractors does not

engage in protected activity unless his or her complaint relates to "fraud against shareholders." It is unnecessary for the Court to decide this issue because the appellees in this case reported alleged violations of federal law relating to fraud against shareholders. To the extent this Court addresses the issue, however, it should conclude that an employee's complaint need not relate to fraud against shareholders in all instances. Section 806 expressly covers six different laws or classes of laws, the last of which is "any provision of Federal law relating to fraud against shareholders." Under established principles of statutory construction, this phrase does not modify the other enumerated laws or classes of laws, and section 806 thus protects whistleblowers who report fraud under any of the enumerated statutes, regardless of whether the misconduct relates to "fraud against shareholders."

ARGUMENT

I. SOX SECTION 806(a) PROTECTS EMPLOYEES OF A PUBLIC COMPANY'S CONTRACTORS AND SUBCONTRACTORS

A. Section 806(a) prohibits a contractor or subcontractor of a public company, as well as the public company itself, from retaliating against covered whistleblowers.

1. Section 806 of SOX provides in pertinent part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), including any subsidiary or

> affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization . . . or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, 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 section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the [SEC], 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) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).

18 U.S.C. 1514A(a).[5]

Interpretation of this provision begins with the text of the statute itself. See United States v. Vidal-Reyes, 562 F.3d

[5] Effective July 22, 2010, after the district court denied the motions to dismiss, Congress amended section 806, *inter alia*, to clarify that section 806 covers certain subsidiaries of public companies. See Pub. L. No. 111-203, tit. IX, §§ 922(b), (c), 929A, 124 Stat. 1376, 1848, 1852 (2010) (Dodd-Frank Wall Street Reform and Consumer Protection Act).

43, 50 (1st Cir. 2009) ("In interpreting the meaning of the statute, our analysis begins with the statute's text") (citations omitted). Section 806(a) identifies a broad range of entities and persons who are prohibited from engaging in retaliation against an employee and specifies the retaliatory behavior prohibited. In particular, section 806 clearly prohibits contractors or subcontractors of public companies, as well as public companies themselves, from retaliating against covered whistleblowers. Section 806 categorically provides both that "no" publicly traded company may engage in prohibited retaliation and that this prohibition extends to "any . . . contractor, subcontractor, or agent of such company." 18 U.S.C. 1514A(a) (emphasis added). Section 806 thus "makes clear that the misconduct it protects against is not only that of the publicly traded company itself, but also that of 'any officer, employee, contractor, subcontractor, or agent of such company,' who retaliates or otherwise discriminates against the whistleblowing employee." Carnero v. Boston Scientific Corp., 433 F.3d 1, 6 (1st Cir. 2006) (citation omitted); see also Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1372 n.4 (N.D. Ga. 2004).

The Department of Labor's Administrative Review Board ("ARB") likewise has recognized that section 806 prohibits retaliation by a contractor, subcontractor, or agent of a

publicly held company.[6] See, e.g., Johnson v. Siemens Bldg. Techs., Inc., ARB No. 08-032 (ARB Mar. 31, 2011); Gale v. World Fin. Group, ARB No. 06-083, 2008 WL 2265208, at *2 (ARB May 29, 2008) (rejecting company's argument that it was not subject to the whistleblower provisions of SOX because it was not a publicly traded company; SOX's "whistleblower protection provision also prohibits 'any officer, employee, contractor, subcontractor, or agent' of publicly traded companies from retaliating against employees.").

3. The Funds, as investment companies that are registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1, et seq., and that file reports under section 15(d) of the Securities Exchange Act, fall within the scope of section 806. Fidelity Management and FMR Co., Inc., which function as investment advisors and contractors to the Funds, are "contractors and subcontractors" to the Funds. See Jones v. Harris Assocs., L.P., 130 S. Ct. 1418, 1423 (2010) (recognizing that a mutual fund's board of directors "must 'review and approve the contracts of the investment adviser' annually") (internal citations omitted); Daily Income Fund, Inc. v. Fox,

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[6] The Secretary has delegated to the ARB the authority to issue final agency decisions in cases arising under section 806. See Secretary's Order 1-2010, 75 Fed. Reg. 3924 (Jan. 25, 2010); see also 29 C.F.R. 1980.110(a).

464 U.S. 523, 536-37 (1984) (the statutory scheme "that regulates most transactions between investment companies and their advisers . . . requires that fees for investment advice and other services be governed by a written contract approved both by the directors and the shareholders of the fund") (internal citations omitted). That the Funds (like most mutual funds) have no employees of their own and instead rely on third parties to operate the funds, particularly private investment advisors and their employees, buttresses the conclusion that the defendants-appellants are covered contractors or subcontractors within the meaning of section 806.

B. Whistleblower protection is afforded to "an employee" of a privately held contractor or subcontractor of a public company.

1. The text of section 806 specifically prohibits public companies and their related entities from retaliating against "an employee" who has engaged in whistleblowing. In affording whistleblower protection to "an employee," section 806 does not restrict protection to an employee of a public company. Rather, the most natural reading of the provision is that whistleblower protection is afforded to "an employee" of any of the categories of entities that are prohibited from engaging in retaliation and have a specified relationship with a public company, including contractors and subcontractors. If Congress had intended to restrict section 806's protections to employees of public

companies, it could have used the limiting phrase "an employee of such company," rather than the more general "an employee," just as Congress limited the entities who are prohibited from discriminating to public companies or "any . . . contractor, subcontractor, or agent of such company" (emphasis added). By using the limiting phrase "of such company" in identifying those who are prohibited from retaliating, while omitting similar limiting language in identifying those protected from retaliation, Congress indicated that section 806's protections are not limited to employees of public companies. See Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).[7]

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[7] Section 806's caption, which refers to "Whistleblower protection for employees of publicly traded companies," does not reflect Congressional intent to limit section 806's scope. Although statutory captions may aid in statutory interpretation, they are in no way controlling. See Massachusetts Ass'n of Health Maint. Orgs. v. Ruthhardt, 194 F.3d 176, 180 (1st Cir. 1999) (reliance on statutory captions "should not be indulged at the expense of the text itself") (internal citation omitted); United States v. Johnson, 632 F.3d 912, 924 (5th Cir. 2011) ("a title alone is not controlling") (internal quotation marks omitted). Section 806's caption cannot mark the outer boundary of the meaning of "an employee," as evidenced, for example, by Congress' decision not to change the caption when it amended section 806 to clarify that it covers certain non-public subsidiaries and affiliates of public companies and to prohibit

Similarly, if section 806 were construed as protecting only the employees of public companies, then contractors, subcontractors or agents could be liable only in the rare circumstance when they have retaliated against the employees of their publicly traded client. While such circumstances are not inconceivable, they hardly reflect the full scope of section 806's coverage. Indeed, such a cramped interpretation of section 806 is inconsistent with its text, which expressly provides, in all-encompassing language, that section 806 protects "an employee" from retaliation by "any" contractor or subcontractor. The inclusion of nonpublic entities such as subsidiaries, affiliates, contractors, and subcontractors as entities prohibited from retaliation would be rendered surplusage if public company employees were the only covered victims of retaliation, because such nonpublic entities have no authority over the "terms and conditions" of public company employees' employment.

2. The Department of Labor's regulations implementing section 806, which this Court concluded in Day v. Staples, Inc., 555 F.3d 42, 54 & n.7 (1st Cir. 2009) are entitled to deference, reinforce the conclusion that the term "employee" encompasses

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retaliation by a "nationally recognized statistical rating organization" or its "officer, employee, contractor, subcontractor or agent."

employees of a public company's contractors, subcontractors, and agents. See Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed. Reg. 52,104 (Aug. 24, 2004).[8] The preamble to the regulations states that:

> Notwithstanding its caption, section 806(a) expressly provides that no publicly traded 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. . . ." The statute thus protects the employees of publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies.

69 Fed. Reg. at 52,105-52,106 (emphasis added). Accordingly, the regulations define an employee as "an individual presently or formerly working for a company or company representative . . . or an individual whose employment could be affected by a company or company representative." 29 C.F.R. 1980.101. The regulations further define "company representative" as "any officer, employee, contractor, subcontractor, or agent of a company." Id. Thus, under the regulations, public companies and any "contractor, subcontractor, or agent" of a public

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[8] The Department of Labor does not have substantive rulemaking authority with respect to section 1514A. Thus, the Secretary is not asking for deference under Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837 (1984) for her procedural regulations.

company are covered under section 806, and section 806's whistleblower protections extend to employees of any of those categories of entities. Id. See Carnero, 433 F.3d at 6 ("If BSA and BSB [subsidiaries of BSC] were agents of BSC, as seems quite possible, their own employee would fit" within the regulations' definition of "employee.") (citing 29 C.F.R.1980.101).

3. The ARB has ruled that section 806's protections extend to employees of a public company's private contractors, subcontractors, and agents. Johnson, ARB No. 08-032, slip op. at 16 ("The Act's legislative history demonstrates that Congress intended to enact robust whistleblower protections for more than employees of publicly traded companies. The legislative history discusses not only Congress's objective of protecting whistleblowing by employees of a publicly traded company, but protecting as well employees of certain private firms that work with, or contract with, publicly traded companies."). See also Klopfenstein v. PCC Flow Techs. Holdings, Inc., ARB Nos. 07-021, 07-022, 2009 WL 2844805, at *5 (ARB Aug. 31, 2009) (non-public subsidiary acted as agent of public company in terminating subsidiary's employee); Kalkunte v. DVI Fin. Serv., Inc., ARB Nos. 05-139, 05-140, 2009 WL 564738, at *8 (ARB Feb. 27, 2009). The ARB's interpretation of section 806's scope is entitled to deference. See Welch v. Chao, 536 F.3d 269, 276 n.2 (4th Cir.

2008) ("Congress explicitly delegated to the Secretary of Labor authority to enforce § 1514A by formal adjudication, . . . and the Secretary has delegated her enforcement authority to the ARB. Thus, we afford deference to the ARB's interpretation of § 1514A of the Sarbanes-Oxley Act.") (internal citations omitted), cert. denied, 129 S. Ct. 1985 (2009).[9]

4. An interpretation of the term "an employee" that limits coverage to employees of public companies would undermine SOX's basic purpose. See Kasten v. Saint-Gobain Performance Plastics Corp., No. 09-834, 2011 WL 977061, at *4 (U.S. Mar. 22, 2011)

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[9] Several district courts and administrative law judges have concluded that section 806 protects only employees of publicly traded companies. See, e.g., Brady v. Calyon Secs. (USA), 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005) (rejecting SOX whistleblower claim of analyst employed by a privately held broker-dealer because section 806 does not protect "the employees of any employer whose business involves acting in the interests of public companies"); Goodman v. Decisive Analytics Corp., ALJ No. 2006-SOX-00011 (ALJ Jan. 10, 2006) (refusing to extend whistleblower protection to the employees of a contractor, subcontractor, or agent). Such decisions generally appear to have been decided based on concerns about the potential breadth of section 806, not based on its text or the pertinent legislative history. Perhaps more significantly, these cases predate Congress' recent clarification of the scope of section 806, see note 5, supra, which made clear that section 806 was not intended to apply only to the employees of public companies. See Sharkey v. J.P. Morgan Chase & Co., No. 10 Civ. 3824, 2011 WL 135026, at *5 (S.D.N.Y. Jan. 14, 2011) (Section 806 protected complainant who reported concerns about client's illegal activity; "[t]he statute by its terms does not require that the fraudulent conduct or violation of federal securities law be committed directly by the employer that takes the retaliatory action.").

("the language of the provision, considered in isolation, may be open to competing interpretations. But considering the provision in conjunction with the purpose and context leads us to conclude that only one interpretation is permissible.") Congress enacted SOX in the wake of the Enron scandal to restore investor confidence in the nation's financial markets. See S. Rep. No. 107-146 (2002). SOX's legislative history demonstrates that Congress intended to enact broad whistleblower protections for employees who report corporate fraud and violations of SEC rules and regulations. Id. at 19 ("U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies."). Congress recognized the important role whistleblowers play in deterring corporate fraud and SEC violations. Id. at 10 ("[O]ften, in complex fraud prosecutions, these insiders are the only firsthand witnesses to the fraud. They are the only people who can testify as to 'who knew what, and when,' crucial questions . . . in all complex securities fraud investigations."). In particular, Congress was aware that both Enron and its consultant and "independent" auditor Arthur Andersen deceived the investing public. See id. at 2 ("Enron apparently, with the approval or advice of its accountants, auditors and lawyers, used thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron's stock

price."). Congress was troubled not only by Enron's misdeeds, but also by those of the "accounting firms, law firms and business consulting firms" – all of whom presumably were private contractors, subcontractors or agents of the publicly-traded Enron – "who were paid millions to advise Enron." Id. at 4.

Congress' concern about the role of related entities in Enron's fraud led it to prohibit such entities from retaliating against employees who come forward to report acts of fraud. Congress was alarmed by a "corporate code of silence" that "discourage[s] employees from reporting fraudulent behavior not only to the proper authorities . . . but even internally." S. Rep. No. 107-146, at 5. In undertaking to combat this "code of silence," Congress specifically recognized that employees at both Enron and Andersen who tried to report violations "or 'blow the whistle' on fraud . . . were discouraged at nearly every turn." Id. Indeed, an "Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices in 2000." Id. The legislative history thus reflects that Congress was concerned not only about the actions of public companies, but also of those related entities, like Arthur Andersen, that provide professional services to public companies.

5. The consequences of excluding the employees of contractors and subcontractors of public companies from section

806's protections would be dramatic. Investment companies, including all mutual funds, are covered by section 806. However, nearly all mutual funds function without any employees of their own, relying instead on third parties, primarily investment advisers. See Harris Assocs., L.P., 130 S. Ct. at 1422 ("A separate entity called an investment adviser creates the mutual fund, which may have no employees of its own.") (citations omitted); Daily Income Fund, 464 U.S. at 536 ("Unlike most corporations, [a mutual fund] is typically created and managed by a pre-existing external organization known as an investment adviser.") (citation omitted).

The employees of a mutual fund's advisers therefore are particularly knowledgeable about a publicly-traded fund's operations and whether they involve corporate fraud. If section 806's protections did not extend to such employees, they would be unprotected by SOX's whistleblower provision, notwithstanding their knowledge of whether the funds they manage are complying with legal requirements designed to prevent SEC violations and shareholder fraud. Other categories of employees with specific knowledge of corporate activity, such as outside accountants and auditors, likewise would be unprotected. Such a result would be inconsistent with Congress' intent to provide whistleblower protection to those particularly well-positioned to blow the

whistle on potential securities violations and shareholder fraud. See S. Rep. No. 107-146, at 10.

II. THE TEXT OF SOX SECTION 806 DOES NOT LIMIT WHISTLEBLOWER PROTECTION TO COMPLAINTS RELATING TO FRAUD AGAINST SHAREHOLDERS

1. The district court erred in limiting whistleblower protection to employees who complain about violations relating to fraud against shareholders. Lawson, 724 F. Supp. 2d at 159-60. A complainant does not necessarily have to establish that a violation involves fraud against shareholders. The text of section 806 expressly covers six different laws or classes of laws: mail fraud (18 U.S.C. 1341), fraud by wire, radio, or television (18 U.S.C. 1343), bank fraud (18 U.S.C. 1344), securities fraud (18 U.S.C. 1348), any rule or regulation of the SEC, and any provision of Federal law relating to fraud against shareholders. Mail fraud, fraud by wire, radio, or television, and bank fraud are not limited to frauds against shareholders. See 18 U.S.C. 1341, 1343 (both applying to "[w]hoever, having devised or intending to devise any scheme or artifice to defraud"); id. 1344 (applying to "[w]hoever knowingly executes, or attempts to execute, a scheme or artifice . . . to defraud a financial institution . . ."). If Congress had intended to expressly limit section 806 to fraud against shareholders, it would have so provided.

2. No court of appeals has directly held that section 806 limits whistleblower protection to employees who report a violation relating to "fraud against shareholders." See, e.g., Allen v. Admin. Review Bd., 514 F.3d 468, 480 n.8 (5th Cir. 2008) ("Because the issue is not before us, we express no opinion on whether the first five enumerated categories of protected activity found in § 1514A require some form of scienter related to fraud against shareholders.") (citations omitted); but cf. Vodopia v. Koninklijke Philips Elecs., N.V., No. 09-4767-cv, 2010 WL 4186469, at *3 (2d Cir. 2010) (unpub'd) (affirming dismissal of SOX complaint that "fails to allege that [the complainant] reasonably believed that he was reporting potential securities fraud as opposed to patent-related malfeasance," without stating which laws in section 806 were allegedly violated). Two district court decisions have relied on the text of section 806 to determine that it protects whistleblowers who report fraud "under any of the enumerated statutes regardless of whether the misconduct relates to 'shareholder' fraud." O'Mahony v. Accenture Ltd., 537 F. Supp. 2d 506, 517 (S.D.N.Y. 2008); see Reyna v. ConAgra Foods, Inc., 506 F. Supp. 2d 1363, 1382-83 (M.D. Ga. 2007) (same). As the O'Mahony court explained:

> By listing certain specific fraud statutes to which [section] 1514A applies, and then separately, as indicated by the disjunctive 'or,' extending the reach

> of the whistleblower protection to violations of any provision of federal law relating to fraud against securities shareholders, [section] 1514A clearly protects an employee against retaliation based upon the whistleblower's reporting of fraud under any of the enumerated statutes regardless of whether the misconduct relates to 'shareholder' fraud.

537 F. Supp. 2d at 517.

3. The ARB similarly concluded in a recent decision that section 806(a)(1) "does not require that the mail fraud or wire fraud pertain to a fraud against the shareholders." Brown v. Lockheed Martin Corp., ARB No. 10-050, slip op. at 9 (ARB Feb. 28, 2011) (citations omitted). But see, e.g., Platone v. FLYi, Inc., ARB No. 04-154, 2006 WL 3246910, at *7 (ARB Sept. 29, 2006) ("[W]hen allegations of mail or wire fraud arise under the employee protection provision of [SOX], the alleged fraudulent conduct must at least be of a type that would be adverse to investors' interests."), aff'd on other grounds sub nom., Platone v. United States Dep't of Labor, 548 F.3d 322 (4th Cir. 2008) (declining to reach question of whether section 806 requires complainant alleging mail or wire fraud to demonstrate that fraud would be adverse to interest of shareholders or investors), cert. denied, 130 S. Ct. 622 (2009).[10]

[10] In a case currently pending before the ARB, Sylvester v. Parexel International LLC, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042 (ARB docketed Sept. 18, 2007), the ARB requested supplemental briefing on several issues relating to the scope of protected activity under section 806, including

Although SOX was intended to prevent corporate fraud generally, not just fraud relating to shareholders, it is not necessary for this Court to decide the reach of the phrase "fraud against shareholders" in this case.[11] Given the relationship between publicly traded mutual funds and their investment advisers, employees of a mutual fund's advisors can be expected to engage in corporate activities that affect investor interests. Moreover, Lawson's and Zang's protected activity involved alleged violations of SEC regulations or federal law relating to fraud against shareholders. This Court therefore can decide this case without determining the outer boundaries of SOX coverage or whether the district court

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whether an employee's whistleblowing activity must relate to fraud against shareholders. The Assistant Secretary of Labor for OSHA filed a brief as amicus curiae in that case, in which the Assistant Secretary argued, based on the statutory text and legislative history, that a claimant need not establish that the asserted violation of the enumerated laws under section 1514A involves or relates to fraud against shareholders.

[11] The statute's limiting principle may be found in its requirement that nonpublic entities prohibited from retaliating against their employees have a specified relationship with a public company (or a statistical rating organization). See Fleszar v. U.S. Dep't of Labor, 598 F.3d 912, 915 (7th Cir. 2010) (noting, in dicta, that "We don't share [the] belief that the phrase 'contractor, subcontractor, or agent' means anyone who has *any* contact with an issuer of securities. Nothing in § 1514A implies that, if [plaintiff's employer] buys a box of rubber bands from Wal-Mart, a company with traded securities, [plaintiff's employer] becomes covered by § 1514A.") (emphasis in original).

correctly interpreted the "fraud against shareholders" requirement.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of the defendants-appellants' motion to dismiss.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(5)and (d), and 32(a)(7)(C), I certify the following with respect to the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellees/Cross-Appellants:

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because this brief contains 6,123 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5)(B) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface of 10.5 characters per inch, in Courier New 12-point type style. The brief was prepared using Microsoft Office Word 2003.

Dated: April 8, 2011

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For Electronic Filings

I hereby certify that on April 8, 2011, I electronically filed the foregoing Brief for the Secretary of Labor as *Amicus Curiae* with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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