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A Glimmer of Hope for Employee Rights

Perhaps because I have been the longtime author of a textbook on employment rights in Pennsylvania, or maybe just because there are a lot of people out there with questions, I probably receive more telephone calls about the difficulty employees face than any other type of legal issue. Most of these telephone calls are by people surprised that they could be fired for virtually any reason so long as there is not a statutory violation, such as discrimination based upon race, color, creed, gender, and other specifically enumerated categories.

One issue that is repeated frequently is the question of whistleblower protection for honorable employees who have developed a conscience about nefarious goings on at their places of employment. Whistleblower protection must be statutory or by specific case law.

Recently, the United States Supreme Court weighed in on a somewhat dormant, but now rapidly expanding whistleblower protection. As Justice Ginsburg explained in *Lawson v. FMR, LLC,* 134 S. Ct. 1158 (2014), the collapse of Enron Corporation was seminal in the passage of the Sarbanes-Oxley Act of 2002. A provision of the Act codified at 18 U.S.C. § 1514A protects whistleblowers.

The section prohibits any public company or any officer, employee, contractor, subcontractor or agent of such a company from discharging, demoting, suspending, threatening, harassing, or in any other matter discriminating against an employee in the terms and conditions of employment because of a whistleblower or other protected activities.

The question that a surprisingly unified Supreme Court addressed was whether § 1514A shields only those employed by the public company itself or does it shield as well employees of privately held contractors and subcontractors. The court found that the law shelters employees of private contractors and subcontractors, just as it shelters employees of a public company served by the contractors and subcontractors.

The facts in *Lawson* concerned former employees of private companies that contract to advise or manage mutual funds. The mutual funds are public companies which in *Lawson* had no employees. If the whistle is to be blown on fraud detrimental to mutual fund investors, the whistleblower employee would be on another company's payroll. In most instances, noted the majority opinion, the employee would be on the payroll of the mutual fund's investment advisor or manager.

The majority opinion reminded its readers that the Enron scandal which prompted the passage of the Sarbanes-Oxley Act involved accounting firms, among others, which participated in Enron's fraud and its cover up. When the employees of

those contractors attempted to bring this conduct to light, they encountered retaliation by the employees.

Sarbanes-Oxley was informed, at least in part, by the "corporate code of silence" which discouraged employees from reporting fraudulent behavior not only to authorities but even internally. Since outside counsel advised company officials at the time, Enron's efforts to quash whistleblowers was not prohibited under existing law at the time. Congress found this lack of protection for employees a "significant deficiency" in the law requiring a remedy.

Whistleblower protection is delegated to the Department of Labor. The Secretary further delegated investigation and adjudication responsibility over claims to the Occupational Safety and Health Administration. An OSHA order may be appealed to an administrative law judge and then to the Department of Labor's administrative review board.

If the Administrative Review Board does not issue a final decision within 180 days of filing of the complaint, and the delay is not due to bad faith on the claimant's part, the claimant may proceed to federal district court for *de novo* review. With respect to remedies, § 1514A(c)(2) provides that a successful claimant is entitled to reinstatement with the same seniority status that the employee would have had, but for the discrimination. The employee will also be entitled to back pay and interest. The court held that the most sensible reading of §15A's numerous references to an employer-employee relationship is that the protection from the law run between contractors and their own employees.

Typically mutual funds are structured in a way so that they have no employees of their own. They are managed by independent investment advisors. The United States investment advising industry manages $4.7 trillion on behalf of nearly 94 million investors. The investment advisors are contractors prohibited from retaliating against their own employees for engaging in whistleblower activity. The construction of the law which the United States Supreme Court adopted protects the insiders who frequently are the only first-hand witnesses to fraud against shareholders.

Not surprisingly, the dissent argued that the opinion of the majority would open the floodgates to claims from babysitters, nannies, gardeners, and others who will file OSHA with § 1514A complaints. In an effort to narrow the scope of its decision, or perhaps to discourage criticism, the majority noted that the word "contractor" refers to a party "whose performance of a contract will take place over a significant period of time." At 1173. Nothing in § 1514A implies, argues the majority, that if a privately held business buys a box of rubberbands from Walmart, a company with trade securities, the business becomes covered by § 1514A. A whistleblower will only be protected to the extent that that person is in a position to detect and report the types of fraud and securities violations that are included in the statute. The allegations in the *Lawson* case squarely fall within § 1514A and the court refused to deny protection to whistleblowers because of ghosts created by those who would limit employee protection.

In 2010, Dodd-Frank Wall Street Reform and Consumer Protection Act amended § 1514A(a). The amended provision actually extended the whistleblower protection of Sarbanes-Oxley to employees of public companies, subsidiaries, and nationally recognized statistical rating organizations. Dodd-Frank established a corporate whistleblower reward program, "accompanied by a new provision prohibiting any employer from retaliating against 'a whistleblower' for providing information to the SEC, participating in an SEC proceeding, or making disclosures required or protected under Sarbanes-Oxley and certain other securities laws." At 1174.

§ 1514A protects employees who provide information to any person with supervisory authority over the employee. Dodd-Frank's whistleblower protection focuses primarily on reporting to federal authorities. The Dodd-Frank inquiry demonstrates that Congress was not concerned about the damages of extending protection comprehensively to corporate whistleblowers.

Justice Scalia, with whom extraordinarily conservative Justice Thomas joined, concurred "in principal part and concurring in the judgment." The concurring justices essentially complained about what they regard as *obiter dictum.*

Justice Sotomayor, with whom Kennedy and Justice Alito joined, dissented. *Lawson* is one of those unusual cases where conservatives joined with liberals while one "liberal" joined with a swing justice and a conservative in dissenting.

It is clear that one of the most divisive issues in the Supreme Court today is not necessarily civil rights and the cases that draw the most media attention, but rather the role of the corporation in America. Opinions on campaign finance reform, attempting to reign in corporate control over the political process, have divided the court more deeply than any time since its founding. Cases on corporate governance and whistleblower protection for employees have not hit on times quite as hard. Nevertheless, the role of the corporation in modern America continues to be controversial.

Lawson v. FMR, LLC, certainly stands for the proposition that nonpublic puppeteers of public corporations will not be able to foment corruption without consequence.

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