Effect of *Lawson v. FMR LLC* on Employees of Contractors to Public Companies

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Contents

The United States Supreme Court made a ruling on how a provision in the Sarbanes-Oxley Act of 2002 (SOX) should be interpreted in the case *Lawson v. FMR LLC*.1) The decision broadly interpreted § 1514A, a whistleblower statute that protects employees who report illegal activities covered by SOX in order to prevent shareholder fraud.2) This comment explains the facts of the case, the reasoning used by the Court to come to its conclusion, as well as the effects of this decision and how this law will potentially be applied in the future. People involved with public companies will have to be aware of this decision to make sure they do not run afoul of the provision.

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1) 134 S.Ct. 1158 (2014).
2) 18 U.S.C. § 1514A (2006 ed.).

Ⅰ. Facts

Lawson v. FMR LLC was recently decided by the United States Supreme Court and stated that SOX's whistleblower protection section covered employees of contractors who work for publically held companies.[3] In *Lawson*, the plaintiffs were former employees of private companies, not subject to SOX, that were contracted to "advise or manage mutual funds."[4] SOX included § 1514A, which said:

"No [public] 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 in the terms and conditions of employment because of [whistleblowing or other protected activity.]"[5]

Plaintiffs claimed they engaged in protected whistleblowing activities and suffered retaliation by the private companies they worked for.[6] Those private companies (collectively referred to by the court as FMR) were contractors for the public company, Fidelity.[7]

FMR, the respondents, argued that § 1514A(a) only applied to employees of public companies, while Lawson and Zang, the petitioners, argued that it applied to employees of contractors who were doing business with the public company.[8] The petitioners had filed suit in the U.S. District Court for the District of Massachusetts where the court refused to dismiss the

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3) 134 S.Ct. 1158 (2014).
4) *Id.* at 1161.
5) 18 U.S.C. § 1514A(a) (2006 ed.) *quoting Lawson* at 1161.
6) *Lawson* at 1164.
7) *Id.*
8) *Id.* at 1165-1166.

case based on respondents' claim that § 1514A only protected employees of publicly held companies.[9] The respondents appealed that decision and the First Circuit reversed the decision stating that "'an employee' refers only to employees of public companies and does not cover a contractor's own employees."[10] The First Circuit Court's dissenting view was similar to that of the Supreme Court, stating that the "majority had 'impose[d] an unwarranted restriction on the intentionally broad language of [SOX]' and 'bar[red] a significant class of potential securities-fraud whistleblowers from any legal protection.'"[11] This issue of what "employee" meant in the context of § 1514A was the main argument of this case.

The Supreme Court granted certiorari in 2013 to decide whether § 1514A also offered protection to employees of privately held contractors who work for publicly held companies.[12] The Supreme Court reversed the holding of the First Circuit Court and remanded the case.[13] The Court held that § 1514A "shelters employees of private contractors and subcontractors, just as it shelters employees of the public company served by the contractors and subcontractors" based on the language of the case, the reason Congress created the law and the interpretation of a similar law that was used as the template for § 1514A.[14] Below the Court's reasons for its decision are discussed in full.

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9) *Id.* at 1164, *citing* 724 F. Supp.2d 141 (Mass. 2010).
10) *Id.* at 1164–1165, *citing* 670 F.3d 61, 68–80 (2012).
11) *Id.* at 1165, *citing* 670 F.3d at 83.
12) *Id.* at 1165.
13) *Id.* at 1176.
14) *Id.* at 1161.

Ⅱ. Legal Background

This case was based on SOX which was created by Congress in response to the Enron scandal. That scandal cost investors more than $70 billion and cost trustees and employees more than $2 billion because of misappropriated investments, stock options, savings plans and pension funds.[15] Part of the reason Enron was able to hide what was really going on with its company was through the help of contractors and subcontractors, such as the accounting firm Arthur Anderson.[16] Employees of those contractors had attempted to blow the whistle on the company's misconduct, but suffered retaliation by their employers who were contractors for Enron.[17] There was a "corporate code of silence" that was meant to keep employees from reporting the fraud externally or even internally and attempts to keep those employees quiet was perfectly legal at the time the Enron scandal took place.[18] After the scandal was exposed, Congress began working on a law to protect investors from such an event happening again.

In order to make sure that employees are protected, since they tended to be "the only firsthand witnesses to the fraud", Congress enacted § 806 of SOX to deal with that issue.[19] Section 806 was entitled "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud" and was added to 18 U.S.C. § 1514A.[20] Congress gave the

15) "Easy Guide to Understanding ENRON Scandal Summary," *Laws.com* (2013) available online at 〈http://finance.laws.com/enron-scandal-summary〉 (last visited 2014-04-25).
16) *Lawson*, at 1162.
17) *Id.*
18) *Id.*, *citing* S. Rep. No. 107-146, at 4-5, 10 (2002).
19) *Id.*, at 1163, *citing* S. Rep. at 10.

Department of Labor (DOL) power to administer this whistleblower protection along with other whistleblower protection provisions and DOL investigated and adjudicated claims under these provisions through the Occupational Safety and Health Administration (OSHA).[21] Orders made by OSHA can be appealed to an administrative law judge and then to DOL's Administrative Review Board (ARB).[22] If ARB does not make a final decision within 180 days of a complaint being filed, the claimant can ask the federal district court to review her case *de novo*.[23] If the employee prevails, he is entitled to "all relief necessary to make the employee whole," which includes getting his job back, with back-pay and attorney fees.[24] This act was modeled after the anti-retaliation section of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21)[25] and § 1514A incorporated AIR 21's administrative enforcement procedures.[26]

The issue submitted before the Court was whether to read § 1514A broadly or narrowly. A broad reading of the case would mean that any employee of a contractor that did business with a publicly traded company would be protected by § 1514A against any retaliation if the employee provided information they believe violated any rule of the SEC.[27] A narrower interpretation, as suggested by the respondents, would limit § 1514A to only protecting employees of the publicly traded company.[28]

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20) *Id.* at 1163.
21) *Id.*, *citing* 78 Fed.Reg. 3918 (2013).
22) *Id.*, *citing* 29 CFR §§ 1980.104 to 1980.110 (2011).
23) *Id.*, *citing* 18 U.S.C. § 1514A(b).
24) *Id.*, at 1163-1164, *citing* 18 U.S.C. § 1514A(c).
25) *Id.*, at 1164, mentioning 49 U.S.C. § 42121.
26) *Id.*, *citing* S. Rep., at 30.
27) *Id.*, at 1161.
28) *Id.*, at 1164.

A narrower reading would limit those that were protected by the law, thereby limiting the amount of claims that could be brought against publicly traded companies and would expose employees to retaliation who might work for a company that helped the public company commit shareholder fraud.

There was disagreement as to how § 1514A should be interpreted. The District Court found that § 1514A covered employees of contractors doing business with publicly traded companies, but limited the claims to those involving retaliation against employees when they reported violations "relating to fraud against shareholders."[29] This limitation was not found within the text of the statute.[30] The First Circuit Court reversed the District Court's decision and found that the statutory interpretation of the law led to the narrower application of the rule.[31] The Circuit Court found that the meaning of the term "employee" was clear; therefore it was not entitled to *Chevron* deference.[32] The *Chevron* rule stated that if the meaning of a law is clear, that meaning must be applied by the courts, even if the agency with power in that area applied a different interpretation.[33] If the meaning was not clear, then the court must follow the agency's interpretation as long as it is a "permissible construction of the statute."[34] The Circuit Court did not want to follow the rule promulgated by ARB in previous agency decisions.

The case was appealed to the Supreme Court, where certiorari was

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29) 724 F.Supp.2d at 163, 159-60.

30) 670 F.3d at 63.

31) *Id.*, at 68.

32) *Id.*, at 81. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 843 (1984).

33) *Chevron* at 842-843.

34) *Id.*, at 843.

granted.[35] Justice Ginsburg wrote the Supreme Court's opinion of the case and was joined by Chief Justice Roberts, and Justices Breyer and Kagan.[36] Justices Scalia and Thomas joined in principal part and Justice Scalia wrote the concurring opinion.[37] Justice Sotomayor, joined by Justices Kennedy and Alito, filed a dissenting opinion.[38] The majority held that by looking at the statutory meaning of the text of § 1514A, the legislative history and the fact that the provision was based on AIR 21, the law protected employees of contractors that serve publicly traded companies.[39] The concurrence agreed with the holding of the majority, but did not think the court should consider legislative history, use AIR 21 as a guide to defining § 1514A's meaning or that there was a limit on what kinds of activities were protected by the whistleblower provision.[40] The dissent agreed with most of the reasoning found in the majority opinion of First Circuit Court's decision, which would lead to a narrower interpretation of § 1514A, and was based on the statute's headings, the context of the statute, and the "absurd results" that would flow from the majority's decision.[41]

The dissent, written by Justice Sotomayor stated that § 1514A was ambiguous and that the ambiguity should be resolved by looking at the title of the statute, looking at the wording within the context of the rest of the statute and the absurdity of the results if the broader definition is accepted.[42] The dissent concluded their argument against the broader

35) *Lawson v. FMR*, 133 S.Ct. 2387 (2013).
36) *Lawson*.
37) *Id*.
38) *Id*.
39) *Id*., at 1161.
40) *Id*., at 1177.
41) *Id*., at 1178.

reading of the statute by stating that the court should not be concerned with what the ARB said about § 1514A.[43]

The dissent argued that the statute was ambiguous because it could be read in two different ways. § 1514A(a) states, "[n]o [public] 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."[44] The dissent pointed out that it is unclear as to who is the "employee" being protected.[45] This provision could be interpreted to mean the employees of public companies cannot be retaliated against or it could mean that the employees of officers, employees, contractors, subcontractors or agents of the public company cannot be retaliated against. Since the rule was ambiguous, it must be resolved by looking at accepted "markers of intent" such as the statute's titles, statutory context and the absurd results if certain interpretations are accepted.[46] The dissent stated the title of the section of SOX that enacted § 1514A supported a narrower interpretation of the provision because it referred to employees of publicly traded companies.[47] Also, the heading of § 1514A(a) stated that the "provision provides '[w]histleblower protection for employees of publicly traded companies."[48] Headings of statutes are not dispositive, but courts have held they are useful tools for helping a court figure out a provision's meaning.[49] The dissent felt that the title gave

42) *Id.*, at 1178.
43) *Id.*, at 1186.
44) *Id.*, at 1178, *quoting* § 1514A(a).
45) *Id.*, at 1178.
46) *Id.*, at 1179–1183.
47) *Id.*, at 1179.
48) *Id.*, at 1180.

a good hint that Congress meant the employees of public companies only.

The dissent also felt that the language of the entire statute supported a narrower interpretation of § 1514A. Most of SOX focused on the actions of public companies.[50] The parts of SOX that focus on private companies and their employees stated so unambiguously, which was in contrast to the ambiguity witnessed in § 1514A.[51] The majority should not have relied on AIR 21 as a guide to determining what definition Congress meant to give to § 1514A, because AIR 21 was not ambiguous when it extended whistleblower protection to employees of contractors.[52] Congress could have followed the language of AIR 21 exactly and chose not to do so; therefore the meaning of similar provisions in AIR 21 should not be imputed on § 1514A.[53]

The majority stated that one reason they thought § 1514A should be read broadly is because only the contractor employers could retaliate against their employees in the ways set out in § 1514A, but the dissent points out that contractors could be hired to retaliate against the employees of the public company and that it has occurred before.[54] The majority believed that such contractor employees would be treated as the agents of the public company and the narrower interpretation of the statute would not be required to reach them.[55] However, the dissent pointed out that if the contractor

49) *Id.*, at 1180, *citing Almendarez–Torres v. United States*, 523 U.S. 224, 234 (1998).

50) *Id.*, at 1181.

51) *Id.*, at 1181.

52) *Id.*, at 1181.

53) *Id.*, at 1181, *citing Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975).

54) *Id.*, at 1181–1182, see, e.g., *Tides v. The Boeing Co.*, 644 F.3d 809, 811 (C.A.9 2011).

was acting without the public company's direction, it would not be an agent and neither the contractor nor the public company could be held liable for the harm suffered by the public company employee whistleblower.[56] Also, just because the remedies in § 1514A include reinstatement does not mean that every whistleblower is entitled to every remedy available, so it is allowable for there to be some whistleblowers not protected by § 1514A.[57]

The dissent argued that if an interpretation of a statute led to an absurd result, it should be avoided when an alternative interpretation was available that would not lead to an absurd result.[58] This was another commonly accepted method of interpreting ambiguous statutory language. The dissent was worried about employees of contractors to public companies that have no involvement with the public company, such as nannies or groundskeepers, that find evidence of the employer engaging in some fraudulent protected by § 1514A.[59] The dissent believed this broad interpretation opened up private companies to many federal lawsuits that dealt with "mundane labor disputes" merely by virtue of the companies having a contract with a public company.[60] Also, there were laws already in place to deal with accounting firms and law firms that retaliated against an employee who reported their observations of potentially illegal behavior.[61]

The dissent would not have given any deference to the broad interpretation

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55) *Id.*, at 1183, fn. 8.
56) *Id.*, at 1183, fn. 8.
57) *Id.*, at 1183.
58) *Id.*, at 1183, *citing Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).
59) *Id.*, at 1184.
60) *Id.*, at 1184.
61) *Id.*, at 1185.

adopted by ARB. The dissent looked at fact that the *Chevron* rule stated that an agency should be deferred to only when "Congress delegated authority to the agency generally to make rules carrying the force of law" and that the interpretation was made pursuant to the exercise of that authority.[62] The dissent pointed out that SOX stated the SEC would have the power to make rules and regulations related to SOX and that it did not matter if the SEC also believed that the DOL had the power to interpret § 1514A.[63] Since the dissent did not find *Spinner v. David Landau & Assoc., LLC* to be entitled to deference, it could only be considered for its persuasive value, which the dissent found lacking.[64]

The majority did give some deference to the broad interpretation adopted by the ARB even though SOX provided that the SEC "shall promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act."[65] It appeared that Congress had given the power to interpret the rules of SOX to the SEC, not the ARB, which would mean that any interpretation by ARB would not be entitled to *Chevron* deference (if the language of the statute was unclear). The majority was not concerned about which agency had the authority to hear the case because the court agreed with ARB's conclusion.[66] The majority also pointed out that the SEC supported the Government's brief that Congress gave the Secretary of Labor the power

62) *Id.*, at 1186, *quoting United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001).

63) *Id.*, at 1186.

64) *Spinner*, No. 10-111 etc., ALJ No. 2010-SOX-029 (May 31, 2012), *Lawson*, at 1186.

65) *Id.*, at 1186-1187, *citing* 15 U.S.C. § 7202(a).

66) *Id.*, at 1165, fn. 6.

to interpret § 1514A.[67] The issue of how to determine which agency has the power to interpret and apply ambiguous statutes became a little muddy under the majority's ruling.

The majority said that it did not matter if they defer to the ARB because they agree with the ARB, but the majority sent a bit of a mixed message because it also stated that the ARB's decision in *Spinner* was persuasive to the Court.[68] Maybe the reason the Court mentions *Spinner* was because that case was decided soon after the First Circuit made their decision and the Supreme Court felt the need to clearly define the meaning of § 1514A in regards to the conflicting decisions between the Circuit Court and agency court. The majority never gave that as a reason, however, so the legal world can only guess as to why the majority considered the ARB decisions.[69] The majority quoted the language in *Spinner* to point out that Congress created SOX to deal with outside professionals like those who contributed to the fraud in the Enron scandal.[70]

The majority in *Lawson* seemed to find the arguments made in the ARB case, *Spinner*, to be persuasive.[71] That case was decided in 2012 and many of the arguments adopted by the Supreme Court in *Lawson* appeared in *Spinner*. The ARB concluded that the complainant was protected by the whistleblower provision in § 1514A when the employee reported misconduct of the public company to his employer that was contracted to work for the public company.[72] The ARB looked at the text of the provision and

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67) *Id*, at 1165, fn. 6, *citing* Brief for United States as *Amicus Curiae* 9–11, 31–34.

68) *Lawson*, at 1165.

69) *See generally*, *Lawson*.

70) *Id.*, at 1169.

71) 2012 WL 1999677 (DOL Adm.Rev.Bd).

found that the language used supported their interpretation.73) ARB did not find that the section title would be dispositive on what the words within the provision meant.74) ARB examined the legislative history and purpose for the law and stated, "[t]he legislative history discusses not only Congress's objective of protecting employees of a publicly traded company, but also protecting employees of private firms that work with, or contract with, publicly traded companies when such employees blow the whistle on fraudulent corporate practices."75) The reason that SOX made references to only applying to public companies was to alleviate the worries of small private companies that were concerned about the burdens of SOX's regulations being applied to them.76) ARB also noted that the purpose of the law was to protect investors and this broad interpretation accomplished that goal.77) ARB compared this law's framework to that of other whistleblower statutes, including that of AIR 21, and found enough similarities in the structure of these other laws to apply the broad interpretation of those laws to § 1514A.78) ARB concluded that whistleblower protection was limited to situations where employees had "a reasonable belief of violations of specific anti-fraud laws or SEC regulations" and that reporting that violation was the reason they suffered the alleged retaliation.79)

72) *Id.*, at *3.
73) *Id.*, at *4.
74) *Id.*, at *6-7.
75) *Id.*, at *8.
76) *Id.*, at *9.
77) *Id.*, at *10.
78) *Id.*, at *10-11.
79) *Id.*, at *12.

Ⅲ. Court's Analysis

We have looked at how the dissent in Lawson v. FMR and the ARB in Spinner have viewed § 1514A in regards to employees of contractors working for publicly held companies. We will now examine the majority's reasons for finding that § 1514A extended protection to employees of contractors doing business for publicly held companies. The majority first examined the meaning of the statutory provision, then looked at the legislative history and purpose for the creation of the law, and finally compared it to AIR 21 to find support in granting whistleblower protection to employees of contractors.

The majority began their inquiry into whether § 1514A would apply to employees of contractors by looking at the meaning of the provision. They began by examining the statute by giving the words their "ordinary meaning."[80] The majority agreed with the dissenting judge in the First Circuit Court decision, which boiled § 1514A(a) down to "no… contractor… may discharge… an employee."[81] The majority also pointed out that when Congress had meant "an employee of a public company," it had stated that clearly throughout SOX.[82] Since Congress did not do that here, the majority felt confident Congress had left out the clarifying language on purpose.

To find the meaning of this section of the provision, the majority examined the language in the context of the whole provision.[83] The prohibited activities in § 1514A(a) were the type that usually only an

80) *Id.*, at 1165, *citing Moskal v. United States*, 498 U.S. 103, 108 (1990).
81) *Id.*, *quoting* 670 F.3d, at 84.
82) *Id.*, at 1165.
83) *Id.*, at 1166.

employer would take against an employee ("discharge, demotion, suspension, threats, harassment, or discrimination in the terms and conditions of employment").[84] The majority did not think this clause was included to guard against the publicly held company hiring a contractor to negatively impact their employees and even if a company did hire a contractor to retaliate against whistleblowers, that activity would cause the "contractor" to be seen as an agent of the public company.[85] The majority felt their interpretation made more sense when considering the provision as a whole.

Congress seemed to have envisioned an employee-employer relationship because it is unlikely that the public company would know if the employee of a contractor was furnishing information to "a person with supervisory authority over the employee."[86] Section 1514A(a)(2) protected an employee from retaliation when the employee reported information about the alleged violation with the knowledge of the employer.[87] Congress seemed to expect the employer to know about what the employee was doing so it made sense that the employee would be protected from her employer, not the public company.[88] The public company would probably only be able to know if an employee of a contractor was reporting this kind of information if the contractor told the public company. If the public company then demanded that the contractor retaliate against the employee, it would still be considered the actions of the contractor, since by nature of being a contractor, the public company could not control the day-to-day business decisions of the contractor.

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84) *Id.*, *citing* § 1514A(a).

85) *Id.*, at 1166.

86) *Id.*, at 1167, *quoting* § 1514A(a)(1).

87) *Id.*, at 1167, *citing* § 1514A(a)(2).

88) *Id.*, at 1167.

Section 1514A claims are governed by the rules set out under AIR 21. AIR 21 consistently protected employees from retaliation by contractor employers, which gave support to the majority's conclusion that Congress also meant the same result in § 1514A.[89] The majority felt that since AIR 21 was used as a model for § 1514A and the corresponding provision in AIR 21 protected the employees of contractors, § 1514A should be interpreted the same way.

The last point considered by the majority in support of their broad interpretation related to the remedies found in § 1514A(c)(2), which stated that a successful claimant could be restored to the position he would have held but for the retaliatory action by his employer.[90] The majority did not think it would make sense for Congress to make a remedy that a contractor could not possible provide for an employee of a public company that did not work for the contractor.[91] The majority did not think it made sense that Congress meant to exclude from whistleblower protection those that worked for contractors doing business for publicly held companies.[92]

The majority looked at § 1514A and used many forms of statutory interpretation. They concluded that Congress must have meant for the broader interpretation of the statute. The majority looked at the plain language of the law, looked at the law in context, and considered how the law would operate, including who would retaliate against the "employee" and the remedies made available to employees. They also considered how AIR 21 operated. The majority was not finished in their analysis of this

89) *Id.*, at 1167.

90) *Id.*, at 1167.

91) *Id.*, at 1167.

92) *Id.*, at 1168.

issue, however and went on to consider the legislative history of the provision.

Justice Ginsberg based her interpretation of the statute on the legislative history and the reasons that Congress created the law in the first place. The whistleblower protection was put in SOX as a means to prevent another Enron scandal from occurring again.[93] The Senate Report showed that Congress placed blame on outside contractors in helping to cover up the fraud that Enron engaged in.[94] During that period, outside contractor employees were fearful of retaliation and that fear was the biggest obstacle to their reporting of the fraud they observed or participated in.[95] Considering the focus of Congress and the large role played by outside contractor's employees, the majority concluded that Congress must have intended to extend protection to that class of people under § 1514A.

The majority pointed out that if whistleblower protection was not extended to employees of contractors, then mutual funds would never be subject to sanctions for retaliating against employees who report instances of suspected fraud.[96] The majority stated that mutual funds had no employees of their own and were managed by "independent investment advisers."[97] The employees of contractors who work for mutual funds were the only people who would realistically be able to observe any shareholder fraud firsthand.[98] Protection would have to be extended to those employees in order to fulfill the purpose of SOX.[99] The majority found it illogical

93) *Id.*, at 1169, *citing* S. Rep., at 2-11.
94) *Id.*, at 1169, *see*, *e.g.*, S. Rep., at 3.
95) *Id.*, at 1170.
96) *Id.*, at 1171.
97) *Id.*, at 1171, *quoting* S. Rep. No. 91-184, p. 5 (1969).
98) *Id.*, at 1171, *citing* S. Rep., at 10.

for those employees to be left without a remedy when they were in the best position to stop any potential fraud.[100)]

The majority also stated that subsequent legislative actions did not create persuasive evidence that Congress intended not to extend protection to employees of contractors. A bill that failed to pass and mentioned mutual fund reform in 6 lines of its 51 pages did not seem relevant to Congress' intentions in regards to employees of mutual fund contractors.[101)] The majority were also not concerned with the fact that a subsequent law (Dodd-Frank[102)]) extended protection to some private companies. That law extended protection to "employees of public company subsidiaries and nationally recognized statistical rating organizations" (NRSROs), but some NRSROs were public companies, and others did not have contracts with public companies, so that did not seem to justify the argument that § 1514A did not cover employees of contractors.[103)] At the time Dodd-Frank was passed, DOL had already stated that § 1514A protected whistleblowers who were employees of contractors.[104)] If Congress had disagreed with DOL's decision, Congress could have easily corrected DOL with its subsequent actions. The majority ended by stating that it did not matter what Dodd-Frank did. The majority was concerned with what § 1514A meant when it was enacted in 2002, which made it sound like it did not matter what Congress did after § 1514A was enacted as long as Congress did not create any

99) *Id.*, at 1172.

100) *Id.*, at 1172.

101) *Id.*, at 1173, fn. 16, *mentioning* Mutual Fund Reform Act, S. 2059, 108th Cong., 2d Sess., § 116(b), which failed to be passed by Congress in 2004.

102) 18 U.S.C. § 1514A(a) (2012 ed.).

103) *Id.*, at 1174.

104) *Id.*, at 1174, *citing* 29 CFR § 1980.101(2009).

laws that would lead to a contrary position than that held by the majority.[105)]

The last element the majority considered when deciding how to interpret § 1514A was to look at AIR 21's whistleblower protection law, which was used as a model for § 1514A.[106)] Section 1514A used § 42121's administrative enforcement rules and paralleled much of the statutory text.[107)] AIR 21 covered contract employees, and since § 1514A was almost the same, it made logical sense that it, too, should cover contract employees. The majority was not concerned with the fact that there were some differences between AIR 21 and § 1514A, such as § 1514A lacking a definition for a contractor and AIR 21 excluding "officers" or "employees" from the governed actors.[108)] The majority stated, "[t]he provisions' parallel text and purposes counsel in favor of interpreting the two provisions consistently."[109)] The majority felt that since the language between the two provisions was similar and the purposes were also similar, they should be given the same effect.[110)]

The reasons that the majority interpreted § 1514A broadly to include contractor employees was because of the language of the statute, the legislative history and the fact that AIR 21, the template for § 1514A, also protected contractor employees. There were only 4 judges who joined in the majority opinion, however, and the concurrence, written by Justice Scalia, suggested that legislative intent was not an acceptable way to interpret a statute. Scalia also pointed out that the interpretation of AIR 21 was an

105) *Id.*, at 1175.
106) *Id.*, at 1175, *citing* S. Rep., at 30.
107) *Id.*, at 1175.
108) *Id.*, at 1176, *quoting* 670 F.3d, at 74.
109) *Id.*, at 1176.
110) *Id.*, at 1176.

unreliable guide to interpreting § 1514A because they were worded "quite differently" in the applicable sections.[111)]

Even if the majority and concurrence did not agree on how to interpret statutes, 6 justices did agree that § 1514A extended whistleblower protection to employees of contractors who do business with public companies. The majority thought that the protection would only apply to reports related to the contractor fulfilling its obligation to the public company, while the concurrence thought that this "limiting principl[e]" had no basis from a textual viewpoint, implying that no limit would be applied when employees sought protection under § 1514A.[112)] According to the Court, employees working for contractors of public companies and who report fraud related to their duties performed for the public companies are certainly covered by § 1514A.[113)] But, perhaps any employee who worked for one of the actors listed in § 1514A and who "report[ed] a covered form of fraud in a manner identified in § 1514(a)(1)-(2)··· [wa]s protected from retaliation."[114)] Discussed below are the possible ramifications of the Court's decision.

Ⅳ. Impact of Decision on USA Law

Lawson was a timely decided case that settled the issue of how to interpret § 1514A that the Circuit Court and ARB disagreed upon. The Supreme Court seemed most concerned with making sure that mutual funds were

111) *Id.*, at 1177.
112) *Id.*, at 1177.
113) *Id.*, at 1176.
114) *Id.*, at 1177.

subjected to SOX. Because mutual funds do not have employees, the Court was worried that anyone who blew the whistle on mutual fund activities would not be protected by SOX and therefore would be discouraged from reporting any potentially fraudulent acts committed by the mutual fund which might hurt shareholders. Because of this concern, the Court decided that a broader definition of § 1514A was necessary and justified for the reasons stated above. Now employers who do business with public companies have been put on notice that they could be liable for violating § 1514A if they retaliate against an employee. The Court in *Lawson* suggested that liability was limited to those situations that involved fraud related to the business that the contractor was doing for the public company. This decision settled a question of interpretation that had already been settled by ARB for agency law, but was not settled in the judicial system.

The Court's interpretation settled one point of law, but also left some questions open. The dissent in *Lawson* pointed out there could be many cases brought to try to test the limits of the decision and that the interpretation made the law too inclusive.[115] The majority did not decide if § 1514A allows contractors to discipline employees of other actors covered by the law.[116] The dissent was also worried as to whether there were any actual limits on the kinds of reported activities that would give employees whistleblower protection.[117] Even though the majority noted there were limitations, that decision was not based on any statutory text and could be considered dicta.

The dissent worried that the broad interpretation of the statute was too

115) *Lawson*, at 1172.

116) *Id.*, at 1166, fn. 7.

117) *Id.*, at 1184, fn. 9.

inclusive and would allow too many lawsuits to be brought, against the intention of Congress when § 1514A was passed. The dissent was concerned that the broad interpretation of the statute would open the floodgates and courts would be overwhelmed with lawsuits.[118] This could be a realistic worry considering that *Lawson* was cited in *Hall v. Hamilton Family Center*, as proof that lawyers are independent contractors when working for their clients.[119] The N.D. California district court stated that there was no reason to rely on *Lawson* since the case had nothing to do with SOX or whistleblower protections.[120] Hall's council seemed to be trying to make a connection between the Supreme Court's reasoning that an independent contractor can cause harm to a plaintiff on behalf of the public company. There could be no conspiracy between Hamilton's lawyers and Hamilton because the lawyers acted independently and without Hamilton's knowledge or direction.[121] Considering that *Lawson* was recently decided, it is surprising that it could be misapplied within a month of its passage. Perhaps the dissent's worry about cases flooding the courts under this broad interpretation was justified.

There was also concern that the broad interpretation would allow too many unintended employees related to public companies to be able to claim whistleblower protection when they realistically had nothing to do with the purposes of SOX. When the statute was interpreted broadly, it seemed like it also covered the personal employees of the company officers and employees.[122] There had not been one case brought under § 1514A that

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118) *Id.*, at 1172.

119) 2014 WL 1410555, at *7, fn. 6.

120) *Hall v. Hamilton*, 2014 WL 1410555, *7, fn. 6.

121) *Id.*, at *7.

122) *Lawson*, at 1168.

was not related to shareholder fraud.[123] Even if the Court's interpretation of the law allowed a babysitter to bring a suit under SOX because his employer worked for a public company, the babysitter thought the son had committed online shopping fraud and was subsequently fired, that does not mean that OSHA or any judicial body would find the case had merit.[124] A lawyer is unlikely to bring such a case unless she thinks she can win at court, especially since such a case would probably have to be contingency-based. This fear of private employees claiming whistleblower protection and meeting the requirements of § 1514A is unlikely.

The Court also showed a lack of forethought of how this decision would affect future cases because it refused to consider the outer limits of the broad interpretation of § 1514A.[125] Because the Court did not define the boundaries of their ruling, later courts will need to determine them and the Supreme Court might be forced to deal with this issue again if a lower court incorrectly applies the law to a subsequent problem where it is questionable if § 1514A applies. The Court stated that there were limits built into the law, such as having to be "'firsthand witnesses to [the shareholder] fraud,'" but there was no corresponding limiting language found in § 1514A.[126] The dissent in *Lawson* noted that the District Court stated, "'the language of the statute itself does not plainly provide such a limiting principle.'"[127] The majority not only broadly interpreted the language of § 1514A, but seemed to limit it in a way not based on statutory language. The concurring opinion in ARB case, *Johnson v. Siemens Building*

123) *Id.*, at 1172.

124) *Id.*, at 1178.

125) *Id.*, at 1173.

126) *Id.*, at 1173, *quoting* S.Rep., at 10. *See generally* 18 U.S.C. § 1514A(a).

127) *Lawson*, at 1184, fn. 9, *quoting* 724 F.Supp.2d 141,160 (Mass. 2010).

Technologies, Inc., also stated that there was a limiting factor in that to claim whistleblower protection the employee would need to show that "the entity engaged in retaliatory conduct was serving as the public company's agent with respect to securities related matters."[128] Both the Supreme Court and the ARB have stated that the protected activity must have to do with shareholder fraud, so even though § 1514A does not provide for such a limitation, that limitation will probably be followed and applied by later courts.

Since the case was decided, three courts have referenced it. All three were district court cases. *Wiest v. Lynch* dealt with § 1514A directly, while the other two cases, *Hall v. Hamilton Family Center* and *United States v. Reyes* just mentioned Lawson briefly for minor points of those decisions. *Hall v. Hamilton* was discussed above. *Reyes*, a New Mexico district court case, briefly mentioned *Lawson*'s concurring opinion to discuss proper methods of statutory interpretation.[129] In *Wiest*, the court followed the Supreme Court's decision in a case that contained similar facts to those seen in *Lawson*.

Wiest v. Lynch was a whistleblower case involving the employee of a contractor to a public company. The plaintiff, Wiest, sued Tyco Electronics Corporation (Tyco) and four individual defendants for retaliating against Wiest after Wiest allegedly participated in protected whistleblower activities.[130] The issue for the court was to decide if the actions of Tyco, a private company that was contracted to do business with the public company Tyco Limited, fell under § 1514A. The court in *Wiest* found that it did[131] and

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128) 2011 WL 1247202, at *17 (DOL Adm.Rev.Bd).

129) 2014 U.S. Dist. LEXIS 43184, *70.

130) 2014 WL 1490250.

noted that the Supreme Court in *Lawson* confirmed ARB's and DOL's interpretation of § 1514A that agents of public companies may not retaliate against their employees.[132] The court emphasized that § 806 did not create "a general whistleblower protection provision imposing liability on any private company or entity acting as an agent of a publicly traded company with respect to any matter whatsoever."[133] This court also pointed out that there were limits on the application of § 806 and that the *Lawson* dissent's fears of a floodgate of cases being opened would not happen.[134] The court in *Wiest* stated that an entity will only be liable for violating § 806 if the entity that retaliated against its employee was serving as a public company's agent in regards to a securities issue.[135]

Lawson has definitely extended the definition of § 1514A and allowed the employees who work for contractors to mutual funds (and other public companies) to be protected by law. The dissent's fears of the floodgates being opened by the broad interpretation probably will not come true, but the above-mentioned *Hall v. Hamilton Family Center* case might be a sign of problems to come. The majority did not deny that private employees of public company employees would also be covered by the statute, but added there was a limiting factor on what kinds of activities the employee would have to be reporting in order to claim protection. The court in *Wiest* seemed to affirm that limiting factor. Perhaps there will only be good effects from the *Lawson* decision and none of the dissent's fears will be realized. Even though it is possible that Congress did not intend the broad

131) *Id.*, at *9-10.
132) *Id.*, at *19.
133) *Id.*, at *21.
134) *Lawson.*, at 1183-1184.
135) 2014 WL 1490250, at *21.

interpretation applied by the Court, Congress will probably leave it be. Maybe the biggest effect of this decision is that contractors (and subcontractors) to public companies will be more careful of their reactions to employees who bring potentially fraudulent behavior to the contractor’s attention.

Ⅴ. Conclusion

Lawson was a significant case that settled the issue of whether contractors to public companies could retaliate against their employees when the employees report instances of suspected disallowed activities that could affect shareholders.[136] The fact that the First Circuit Court interpreted § 1514A more narrowly than the ARB had showed that there was confusion about what the provision meant and the Supreme Court was able to settle the point for the courts. The effects of this ruling will hopefully lead to fewer instances of shareholder fraud and more reports when employees see it. There is a danger that this decision will lead to lawsuits being brought by employees that Congress did not intend to protect under § 1514A. However, Congress did pass SOX in order to prevent shareholder fraud, so even if a personal employee of someone who works for a public company somehow witnessed shareholder fraud and were retaliated against for reporting it, that employee should be protected regardless of whether she was an accountant or a babysitter.

This decision also closed a loophole for public companies that did not

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136) *See generally Lawson*.

have their own employees, but rather had all the day-to-day tasks handled by contractors, such as mutual funds. The Circuit Court held that the employees who actually did the work for mutual funds and were in the best position to view violations of SOX were not protected by § 1514A. The Supreme Court in *Lawson* felt that went against one of the main purposes for SOX and interpreted the ambiguously worded provision broadly. Through this decision, the Supreme Court ensured protection for the employees who actually do the work for mutual funds.

The biggest issue with this case is if the interpretation was not what Congress intended when the provision was enacted and whether unintended parties will bring lawsuits and clog up the courts and expose privately owned companies and employers to unexpected and unintended liability. The majority in *Lawson* explained why it felt that the broad interpretation accomplished what Congress intended, including the fact that the law was meant to protect employees who witnessed shareholder fraud and prevent another Enron scandal from occurring. The Court felt it was unlikely that the private employees of people who work for public companies would bring such an action, but that those private employees should be protected if they witnessed shareholder fraud. The majority was probably correct in stating that it is unlikely that babysitters of public company employees or officers will bring such a suit, but the door has been opened by the *Lawson* decision.

The immediate effect of this decision will be that contractors to public companies will be put on notice that they are liable for retaliatory actions taken against their employees who report potential violations of the SEC regulations and SOX. There will also probably be lawsuits brought to test the limits of the law and it might be misapplied for a while, such as observed in *Hill v. Hamilton Family Center*. As seen in *Reyes*, some courts might question the methods of legislative interpretation the Court used, but that issue is beyond the scope of this article.

One last issue to consider is the importance of whistleblower protection. Employees who observe illegal activity have no incentive to report those observations if the law does not protect them from retaliation by their employers. As seen in the Enron scandal, lawyers were consulted to see what the limits of the law were, and were used to keep would-be whistleblowers quiet. Employees do owe a duty of loyalty to their employers, but not when their employers engage in illegal activities, especially the kind that could harm the economy of a nation and injure shareholders who invest their money based on truthful reporting. Even though the United States considers itself to be a capitalist society, pure capitalism is undesirable. Protections must be put in place to protect the economic health of the nation as well protect consumers; whistleblowers can help accomplish those goals. It is necessary to balance the interests of freedom of contract against those of employees, shareholders and general members of society.

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[국문초록]

Lawson v. FMR LLC 판결이 상장기업의 하청업체 직원에게 미치는 영향

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최근 *Lawson v. FMR*, 134 S.Ct. 1158 (2014)이 3월에 미연방대법원에서 결정되었는데, 2002년의 Sarbanes-Oxley Act의 내부 고발자 보호 조항인 18 U.S.C. § 1514A의 의미를 해석하고 있다. 본 논문은 대법원이 입법목적을 달성하기 위하여 § 1514A을 넓게(광의로) 해석하고 있는 경위를 검토하고자 한다.

미연방대법원은 위 판결에서 다른 여러 가지 이유를 제시하였지만, 주된 요지는 mutual fund와 같은 상장기업들이 자사 인력을 고용하지 아니하고, 하청업자를 사용하는 경우에도 § 1514A의 법적 책임을 피할 수 없다는 것을 분명하게 밝히고자 한 것으로 보인다. 이 사건 피고회사는 mutual fund 회사인 Fidelity로부터 그 회사의 일상업무를 수행하기 위한 하청계약을 체결한 비상장회사이다. 따라서 법적으로는 § 1514A의 적용을 받지 않고 있었다. 원고는 피고의 직원이었다. 위 사건에서 법원은 FMR(피고 회사)이 상장기업의 하청업체이었고, 원고들은 주주를 침해하는 행위들(내부고발보호법령에 의하여 보호되는 행위)을 알렸다(report)는 사실을 인정한 뒤, 원고들의 행위는 § 1514A에 의하여 보호된다고 판결하였다. 이에 대하여 § 1514A는 좁게 해석되어야 한다는 강력한 반대의견이 있었다. 그 의견에 따르면, 상장기업에 관련된 하청업체 기타 관계회사들은 상장기업의 임직원들에게 불리한 행위를

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할 수 없고, 따라서 상장기업의 하청업체 직원은 내부 고발자를 위한 § 1514A의 보호를 받을 수 없다는 것이었다. 이 사건의 결론은 놀라운 것일 수 있는데, 일반적으로 많은 법학자들이 위 조항의 보호를 받지 않을 것으로 생각했던 많은 사람들에 대하여 위 조항의 보호 범위를 확장시켰기 때문이다. 위 판결은 주주에 대한 사기를 방지하기 위한 최적의 위치에 있는 하청업체 직원들을 확실하게 포함시키고 있지만, 이러한 해석은 입법 당시 의회가 생각하였던 보호범위를 벗어나서 상장회사(고용주)에게 수많은 소송에 휘말리게 할 가능성을 내포하는 것이다. 위 법이 상장회사의 하청업체에게만 국한될 것인지, 아니면 보모나 수위와 같이 상장회사 직원들에게 개인적으로 고용된 사람까지 보호범위를 확장할는지는 알 수 없다. 또한 보호되는 직원들의 어떠한 행위가 보호의 대상이 되는지도 쟁점이 될 수 있다. 그리고 그 보호는 주주들의 기대를 보호하는 것을 넘어서서, 직원들의 사장이 관여하는 모든 사기 행각 일체를 포함할 수도 있을 것이다. 본 논문에서는 이 판결이 가져올 수 있는 결과에 대하여 살펴본다. 위 판결이 주주에 대한사기를 방지하는 데 도움이 될 것이라는 결과, 다른 한편, 현실적으로 위 법의 입법목적과는 아무런 상관이 없는 소송이 § 1514A을 근거로 제기될 수도 있는 결과에 대하여 살펴본다. 미연방대법원은 § 1514A의 광의해석에 대하여 몇 가지 납득할 만한 이유들을 밝혔다. 그러나 대법원이 입법목적을 통하여 당연히 존재할 것으로 생각하는 확장해석의 한계는 없을 수도 있으며, 추후의 사법해석이나, 나아가 국회의 새로운 입법을 필요로 할 수도 있다고 하겠다.

주제어 : 하청업체 직원, 뮤추얼 펀드, 사베인 – 옥슬리 법, § 1514A, 내부 고발자 보호