Outside Counsel

Wider Scope of Employees Covered By Sarbanes-Oxley Whistleblower Law

By **Eric Dinnocenzo**

In recent years, the Department of Labor Administrative Review Board (ARB) has liberally interpreted the whistleblower protections contained in Section 806 of the Sarbanes-Oxley Act of 2002 (SOX). It has continued this trend in *Spinner v. David Landau & Associates*, ARB Nos. 10-111, 10-115 (May 31, 2012), extending the protections beyond employees of publicly traded companies to employees of their contractors. In short, attorneys, auditors and accountants at private firms who perform work on behalf of publicly traded companies are now also protected from retaliation if they engage in SOX whistleblowing activity.

The decision is significant because it represents a split from the U.S. Court of Appeals for the First Circuit holding in *Lawson v. FMR*, 670 F.3d 61 (1st Cir. 2012), which limited the reach of Section 806 to publicly traded companies. Outside of the First Circuit, it will potentially cause a significant number of employees to fall under the umbrella of SOX whistleblower protections, as federal agencies are not bound by decisions from other circuit courts where a case is not reviewable.[1]

Congress enacted SOX in 2002 in the wake of major corporate and accounting scandals, such as those involving Enron, Arthur Andersen, and WorldCom, that shook the nation's economy and caused the loss of pension and retirement benefits for thousands of workers. The legislation's aim was to address corporate fraud, specifically in the areas of financial accounting and corporate governance.

In order to protect whistleblowers, Section 806 was enacted which 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…" who engages in certain enumerated whistleblowing activity.

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Textual Analysis

In *Spinner*, the complainant, Thomas Spinner, was an internal auditor employed by the respondent, David Landau & Associates (DLA), a private company that provided internal audit and SOX-compliance services. Spinner was placed on assignment with a publicly traded company, S.L. Green, and less than 30 days later DLA pulled him from the job and terminated his employment. Spinner alleged that this adverse action was due to his reporting of internal control and reconciliation problems at the company—protected activity under SOX.

> The ARB in 'Spinner' extends the whistleblower protections in Section 806 of SOX beyond employees of publicly traded companies to employees of their contractors.

The federal administrative law judge dismissed the complaint on the grounds that, because DLA is not a publicly traded company, Spinner was not a covered "employee" under Section 806. In reversing and remanding this decision, the ARB engaged in a thorough examination of the text, legislative history, and remedial purpose of SOX to arrive at its holding that employees of contractors hired by publicly traded companies are protected from retaliation arising from whistleblowing activity.

The first step of the ARB's analysis was to conduct a textual analysis of Section 806, finding that it is not restricted to employees of publicly traded companies. If this were Congress' intent, the ARB wrote, it could have tagged the term "employee" to limit it to that of a publicly traded company. While the clause "contractor, subcontractor, or agent of such company" refers to a company that is publicly traded, by referring specifically to "such company," there is no similar qualification for the term "employee." Because no such limitation exists in the statute, the ARB declined to impose one.

This textual parsing differs from that of the First Circuit, which found that a "more natural reading" is that the clause "officer, employee, contractor, subcontractor, or agent of such company" pertains to who is prohibited from engaging in retaliation and that the subsequent term "employee" applies only to employees of publicly traded companies.[2] Otherwise, if the term "employee" is broadly interpreted, it would lead to the awkward result of including employees of an "officer" of a publicly traded company, and employees of an "employee" of a publicly traded company, within its scope, which clearly could not have been the legislative intent.

Policy and History

Moving on from an analysis of the text, the ARB considered that limiting the scope of covered employees would lead to unintended results. In that case, Section 806 would prohibit a contractor from retaliating against employees of a publicly traded company, while seemingly allowing the contractor to retaliate against its own employees. The opportunity for a contractor to adversely affect the terms and conditions of an individual's employment with a publicly traded company—in many cases, the company that hired the contractor—would be a rather rare occurrence. Such a constrained reading of Section 806 would also be inharmonious with the statute's remedy of reinstatement of an aggrieved employee, since it would be unlikely that a contractor would have the authority to reinstate a whistleblow-

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ing employee of a publicly traded company after the employee had been terminated.

The ARB also examined the legislative history of SOX. It cites a Senate report which observed, among other things, that Enron's collapse was facilitated by Arthur Andersen (not a publicly traded company), that an Andersen partner was removed from the Enron account after expressing reservations about its accounting practices, and that Enron's lawyers counseled their client, as it was contemplating the discharge of employees who reported improper accounting practices, that Texas law did not protect corporate whistleblowers.[3]

In light of this history, the ARB declared that Congress recognized that outside professionals such as attorneys, accountants, and auditors were complicit in the Enron debacle, and therefore, "[a]n interpretation limiting protection of whistleblowers to those only directly employed by a publicly traded company would sabotage the overriding purpose of protecting investors."

Finally the ARB found support for its decision in other whistleblower statutes that have also been interpreted to afford protection to employees of contractors, with examples being the Energy Reorganization Act, Pipeline Safety Improvement Act of 2002, and the Wendell H. Ford Aviation Investment Reform Act for the 21st Century.

It will be interesting to see if other circuit courts weigh in on this important issue of the scope of employees who are covered by the Section 806 whistleblower protections.

1. *Spinner* at 6 fn. 10 (citations and quotations omitted).
2. *Lawson,* 670 F.3d at 68.
3. *Spinner,* at 11-12 citing S. Rep. 107-146, 2002 WL 863249, at **2-5 (May 6, 2002).