

# Sarbanes-Oxley Act Alert

## **MASSACHUSETTS FEDERAL DISTRICT COURT JUDGE INTERPRETS SARBANES-OXLEY WHISTLEBLOWER PROVISION TO PROTECT EMPLOYEES OF INVESTMENT ADVISORS THAT ARE PRIVATE COMPANIES PERFORMING SERVICES FOR PUBLIC COMPANY MUTUAL FUNDS**

***Lawson v. FMR LLC, et al.*, Civil Action No. 08-10466-DPW and 08-10758-DPW  
Memorandum and Order, March 31, 2010**

### **Summary**

A recent decision by Judge Woodlock of the Federal District Court of Massachusetts allowed two plaintiffs to proceed with their whistleblower protection claims pursuant to the Sarbanes-Oxley Act (“SOX”) even though neither plaintiff was employed by a public company. Highlighting the unique relationship between a publicly owned mutual fund and its investment advisor, this decision represents a more expansive interpretation of the SOX Whistleblower Protection Provision than that reached by other federal district court judges. These conflicting decisions in the district courts may foretell a circuit split that will ultimately lead to resolution of the issue by the United States Supreme Court.

### **The Lessons**

- Pending definitive resolution of the issue, whistleblowers employed by private companies should pursue and preserve claims for protection from retaliation under SOX where their employer may be an “officer, employee, contractor, subcontractor, or agent” of a public company.
- Any employee of a private company who has been retaliated against for actions defined as whistleblowing activity under SOX should closely examine his/her employer’s relationship to any public companies, as a colorable SOX claim may exist.

### **The Sarbanes-Oxley Act**

Passed in the wake of several infamous corporate fraud scandals at the turn of the century, the Sarbanes-Oxley Act provides a range of punishments and penalties for defrauding shareholders of publicly traded companies.

Section 806 of SOX, codified at 18 U.S.C. § 1514A, provides that 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*” for reporting or assisting in an investigation of conduct which the employee reasonably believes violates certain enumerated fraud statutes, any SEC rule or regulation, or any federal law relating to fraud against shareholders.

### **The Case**

The Plaintiffs were two former employees of privately owned Fidelity companies (“Fidelity Defendants”). The Fidelity Defendants allegedly act as the investment advisors to the Fidelity family of mutual funds (“Funds”). The Funds are publicly owned companies which have no employees and are overseen by a Board of Trustees.

Ms. Lawson, a former senior director of finance with one of the Fidelity Defendants, reported to her management and general counsel various issues including inaccuracies in expense reporting and improper retention of fees, and filed complaints with OSHA which initially investigates SOX claims. Her employer allegedly responded by lowering Lawson's performance ratings, reducing her bonus compensation, and engaging in harassing behavior. Lawson eventually resigned. The other Plaintiff, Mr. Zang, was a portfolio manager for several mutual funds. Zang was allegedly terminated by one of the Fidelity Defendants in retaliation for reporting to his superiors that certain filings sent to the SEC contained inaccurate information which he believed violated several securities laws.

In their complaints the Plaintiffs alleged, *inter alia*, that they were retaliated against in violation of Section 806, the SOX whistleblower provision. The Fidelity Defendants argued in support of their motion to dismiss that the Plaintiffs were employees of private companies and therefore their activity was not protected by Section 806.

In its lengthy Memorandum and Decision, the court considered whether an employee protected by Section 806 included, in addition to an employee of a public company itself, an employee of "any officer, employee, contractor, subcontractor, or agent" of a public company. After an extensive and thorough analysis of the statute's text and legislative history, the court decided that Section 806 not only protects whistleblowing activity by an employee of a public company but also by an employee of a private company whose relationship to a public company came within the statutory categories.

The court found that the Fidelity Defendants were related to a public company in a such a way, reasoning as follows:

In their role as investment advisors to the Funds, the Fidelity Defendants performed various administrative and executive tasks for the Funds, including fundamental investment decision-making. Because of this unique relationship between investment advisors and mutual funds, Congress has even imposed a fiduciary duty for investment advisors concerning compensation by the mutual fund. Since the public Funds are operated by investment advisors and do not have any employees of their own, if Section 806 only covered employees of public companies, then any reporting of fraud against the Funds' shareholders would be unprotected from retaliation.

In light of Judge Woodlock's interpretation of the scope of whistleblower protection under SOX, a more expansive interpretation than that reached, for example, by cases in the Southern District of New York, counsel for employees with potential whistleblower claims against employers who are private companies should examine the employer's relationship to a public company to determine whether SOX claims may exist.

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