U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

THOMAS SPINNER,

COMPLAINANT,

v.

DAVID LANDAU and ASSOCIATES, LLC,

RESPONDENT.

ARB CASE NOS. 10-111
10-115

ALJ CASE NO. 2010-SOX-029

DATE: May 31, 2012

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Daniel A. Corey, Esq., *Sensible Law Institute*, Drexel Hill, Pennsylvania

For the Respondent:
Keith J. Rosenblatt, Esq., Jacqueline K. Hall, Esq., *Littler Mendelson, P.C.*, Newark, New Jersey

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*; Judge E. Cooper Brown concurring.

FINAL DECISION AND ORDER OF REMAND

This case arises under Section 806 of the Sarbanes-Oxley Act of 2002 (Section 806), 18 U.S.C.A. § 1514A (West Supp. 2010).[1] The issue on appeal is whether Section 806 applies only to publicly traded companies and their employees.[2] Thomas Spinner was an employee of Respondent David Landau & Associates (DLA). DLA was a contractor of a publicly traded corporation but was not itself publicly traded. After DLA terminated Spinner's employment, he filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his termination violated Section 806 and its implementing regulations at 29 C.F.R. Part 1980 (2011). The Administrative Law Judge (ALJ) granted summary decision in favor of DLA, concluding that DLA was not publicly traded and therefore neither DLA nor its employees were covered under Section 806. We reverse and remand.

BACKGROUND

Spinner is a Certified Public Accountant, Certified Internal Auditor, and Certified Fraud Examiner. DLA hired Spinner in March 2008 as an internal auditor. DLA provides internal audit, forensics, and advisory and management consulting services, including SOX audit and compliance services,[3] under contract to S.L. Green Realty Corp. (S.L. Green), a publicly traded company.[4] On or about September 2, 2008, DLA assigned Spinner to perform full-time auditing services for S.L. Green. DLA subsequently removed Spinner from this assignment, and on or about October 1, 2008, terminated Spinner's employment. Spinner filed an administrative complaint with OSHA on December 29, 2008, claiming DLA violated Section 806 when it terminated him because he reported internal control and reconciliation problems at S.L. Green. OSHA issued its finding on February 5, 2010, concluding in part that DLA, as a contractor of S.L. Green, was itself a covered entity and that Spinner, having alleged misconduct by S.L. Green, was a covered employee. OSHA concluded, however, that clear and convincing evidence demonstrated that DLA would have taken the adverse action even if Spinner had not engaged in protected activity.

Spinner objected to OSHA's findings, and the case was assigned to an ALJ. DLA filed a motion for summary decision on two grounds: DLA is not a covered entity and DLA would

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[1] The Act and its implementing regulations (29 C.F.R. Part 1980) have been amended since Spinner filed his complaint. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010); 76 Fed. Reg. 68,084-97 (Nov. 3, 2011). Neither the amendments to SOX nor the regulations' amendments would affect the outcome of this case.

[2] For convenience, we refer to companies registered under Section 12 or required to file under Section 15(d) of the Exchange Act as "publicly traded."

[3] ALJ Recommended Summary Decision Dismissing Complaint (D. & O.), at n.1.

[4] The Respondent refers to S.L. Green as "a client for whom DLA had conducted audits in years past." DLA Br. at 9. The parties do not dispute that DLA is a contractor of S.L. Green.

have terminated Spinner even if he had not engaged in protected activity. The ALJ granted summary decision, as matter of law, on the grounds that DLA was not a covered entity and that Spinner, as an employee of DLA, was not a covered employee. On appeal to the Administrative Review Board (ARB or Board), Spinner argues that the ALJ erred and that he was covered as an employee of DLA because DLA was a contractor, subcontractor, or agent of S.L. Green. DLA cross-petitioned requesting the ARB to issue a $1,000 penalty against Spinner for filing a fraudulent administrative claim. DLA also asked the Board to hold that the ALJ erred in failing to find that clear and convincing evidence demonstrated that it would have terminated Spinner absent protected activity.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under the SOX. *See* Secretary's Order 1-2010 (Delegation of Authority and Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). We review a recommended decision granting summary decision de novo. That is, the standard that the ALJ applies also governs our review. 29 C.F.R. § 18.40 (2011). Accordingly, summary decision is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The determination of whether facts are material is based on the substantive law upon which each claim is based. A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the action.

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law. *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002). "To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'" *Bobreski v. U.S. Envtl. Prot. Agency*, 284 F. Supp. 2d 67, 73 (D.D.C. 2003) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party." *Bobreski*, 284 F. Supp. 2d at 73.

Furthermore, a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c); *Webb v. Carolina Power & Light Co.*, No. 1993-ERA-042, slip op. at 4-6 (Sec'y July 14, 1995).

DISCUSSION

This case presents the issue of whether Section 806(a) of the Sarbanes-Oxley Act, 18 U.S.C.A. § 1514A(a), affords whistleblower protection to an employee of a contractor of a

publicly traded company when the employee reports activity that he reasonably believes constitutes a violation of the laws or SEC regulations identified under Section 806. The ALJ cited the language of SOX, its legislative history, and decisions from a variety of forums to support his conclusion that Section 806's coverage is limited to publicly traded companies and their employees.[5] D. & O. at 2-3. Department of Labor regulations and Board precedent, however, state that whistleblower protection is not limited solely to employees of publicly traded companies. As explained below, we reverse the ALJ's decision and find that Spinner is a covered employee under Section 806.

The Department of Labor regulations implementing Section 806, which we are obliged to follow,[6] define 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. A "company representative" is defined as "any officer, employee, contractor, subcontractor, or agent of a company." *Id*. These regulations explicitly identify two distinct bases for coverage as an "employee" under the statute: (1) coverage based simply upon being an employee (or former employee) of a named publicly traded company, or a "contractor, subcontractor or agent" of such company and (2) coverage based upon the more conventional master-servant relationship expressed as "an individual whose employment could be affected by" a named employer. As explained in the preamble accompanying the regulations' promulgation, the Department views Section 806 as "protect[ing] the employees of publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies."[7]

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[5] Although the decision is imprecise on this point, the ALJ appeared to also rule that only publicly traded employers are covered by the proscriptions contained in Section 806. We disagree and reverse. Given our precedent, the implementing regulations, and the fact that the plain language of Section 806 explicitly identifies several categories of potentially covered employers which are not registered or required to file under the Exchange Act (i.e., "any officer, employee, contractor, subcontractor, or agent of such company"), it is unnecessary to elaborate on our conclusion that Section 806 covers certain non-publicly traded entities including contractors. On this issue, we concur with the First Circuit, which recently concluded that "the clause 'officer, employee, contractor, subcontractor, or agent of such Company' goes to who is prohibited from retaliating or discriminating." *Lawson v. FMR, LLC*, 670 F.3d 61, 68 (1st Cir. 2012); *see also Kalkunte v. DVI Financial Servs. & AP Servs.*, ARB Nos. 05-139, -140; ALJ No. 2004-SOX-056 (ARB Feb. 27, 2009)(holding a contractor jointly liable, together with a publicly traded company, for retaliatory discharge of an employee of the public company where the contractor, through its own employees, made decisions affecting the employee's employment).

[6] *See* 75 Fed. Reg. 3925 (Jan. 15, 2010) ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations . . . and shall observe the provisions thereof, where pertinent, in its decisions.").

[7] 59 Fed. Reg. 52,104, 52,105-52,106 (Aug. 24, 2004). This expansive definition of "employee" under Section 806 reflects decades of Department of Labor precedent extending coverage under analogous whistleblower statutes to employees of contractors. *See* discussion, *infra* pp. 13-16.

Consistent with the Department's understanding, the ARB has repeatedly interpreted Section 806 as affording whistleblower protection to employees of contractors, subcontractors, or agents of publicly traded companies, regardless of the fact that the contractor, subcontractor, or agent was not itself a publicly traded company. *See Charles v. Profit Inv. Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-040 (ARB Dec. 16, 2011); *Funke v. Federal Express Corp.*, ARB No. 09-004, ALJ No. 2007-SOX-043 (ARB July 8, 2011); *Johnson v. Siemens Building Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011)[8] As the ARB explained in *Funke*:

> In drafting § 1514A, Congress pointedly expanded traditional employer-employee definitions by subjecting additional entities to liability for retaliation, not only publicly traded companies, but "any officer, employee, contractor, subcontractor, or agent of such company." Congress understood that to effectively address corporate fraud, the law needed to extend to entities *related* to public companies – accounting firms, law firms, and the like – which may themselves be involved in performing or disguising fraudulent activity. Employees of these non-public entities are also covered under § 1514A, and by extension, their reports of misconduct by the related public company (not their employer) would be protected under the statute.[9]

Notwithstanding this body of ARB case authority, the majority in *Lawson v. FMR, LLC*, 670 F.3d 61 (1st Cir. 2012), recently held that Section 806 provides whistleblower protection only to employees of publicly traded companies. The *Lawson* plaintiffs were employees of investment advisors servicing publicly traded mutual funds. After rejecting respondents' motion for summary judgment for lack of coverage, the District Court certified to the First Circuit the question of coverage of employees of investment advisors servicing publicly traded mutual funds. The First Circuit, like the ALJ in this case, ruled that employees of those non-publicly traded entities are not covered under Section 806.

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[8] In *Kukucka v. Belfort Instrument Co.*, ARB Nos. 06-104, -120; ALJ Nos. 2006-SOX-057, -081 (ARB Apr. 30, 2008), the ARB recognized in dicta that an employee of a contractor, subcontractor, or agent of a publicly traded company could be protected by Section 806. In *Gale v. World Fin. Group*, ARB No. 06-083, ALJ No. 2006-SOX-043 (ARB May 29, 2008), the ARB cited evidence showing that complainant's employer served as an agent of a public company in promoting sale of securities products as sufficient to establish a genuine issue of fact concerning coverage under Section 806). In *Klopfenstein v. PCC Flow Techs.*, ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006) (*Klopfenstein I*), the ARB held that a non-publicly traded subsidiary acting as an agent of its publicly traded parent company was itself liable under Section 806 for its retaliatory termination of one of its employees.

[9] *Funke*, ARB No. 09-004, slip op at 9-10.

The First Circuit's *Lawson* holding is not controlling in this case, and we decline to adopt it.[10] As stated in *Charles*, ARB No. 10-071, and *Johnson*, ARB No. 08-032 – both issued prior to the First Circuit's *Lawson* decision – we cannot conclude that Section 806 coverage is limited to employees of public companies. The legislative history of the SOX "demonstrates that Congress intended to enact robust whistleblower protections for more than employees of publicly traded companies." *Johnson*, ARB No. 08-032, slip op. at 17. Nevertheless, in light of the First Circuit's decision in *Lawson*, it is imperative to fully explain the basis for our holding that accountants employed by private accounting firms, who in turn provide SOX compliance services to publicly traded corporations, are covered as employees of contractors under Section 806.

1. Section 806 Textual Analysis

Congress enacted Section 806 on July 30, 2002, as part of the comprehensive effort contained in the Sarbanes-Oxley Act (SOX) to address corporate fraud. Title VIII is designated the Corporate and Criminal Fraud Accountability Act of 2002 (the Accountability Act). Section 806, the employee-protection provision, prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to certain enumerated infractions. The provision, as amended, reads, in relevant part:

> (a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES. – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(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 –
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> (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],

[10] The case before us did not arise in the First Circuit, so we are not bound by *Lawson*. Because there is no rule of intercircuit stare decisis, federal agencies are not bound by the decision of a circuit court in litigation arising in other circuits. *See Brizendine v. Cotter & Co.*, 4 F.3d 457, 462 n.4 (7th Cir. 1993) (vacated on other grounds); *see generally* Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 735-41 (1989). *See also Nichols v. Bechtel Constr. Inc.*, 1987- ERA-044, slip op. at 6 (Sec'y Oct. 26, 1992), *aff'd sub nom. Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995).

> or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, 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 –
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> > (A) a Federal regulatory or law enforcement agency;
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> > (B) any Member of Congress or any committee of Congress; or
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> > (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); or
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> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 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.

18 U.S.C.A. § 1514A.

To determine whether an employee of a "contractor, subcontractor or agent" is afforded protection under Section 806, the starting point "is the language of the statute itself"[11] and the implementing regulations construing the relevant statutory text.[12] The plain language of the statute does not restrict its application to employees of publicly held companies. Congress could easily have limited coverage simply by statutorily defining the term "employee" or by adding the words "of such company" after the term "employee" – exactly as Section 806 limits those liable under the statute to "any officer, employee, contractor, subcontractor, or agent of *such company*." Had Congress chosen to so limit the text, Section 806 would extend coverage solely to "employees *of such company* [with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d))]."[13] The statute contains no such limitation, and we decline to impose one.

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[11] *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); SINGER & SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 46.1 (7th Ed.).

[12] *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009).

[13] *See Pac. Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680, 687 (2012).

Nevertheless, the statute's lack of definition of "employee" leaves the text open to competing problematic interpretations. The *Lawson* majority argues that Congress could not have intended to protect employees of contractors, subcontractors, or agents because that would also mean that Congress intended to protect employees of an "employee" or employees of an "officer," which leads to an absurd result. *United States v. Wilson*, 503 U.S. 329, 334 (1992) (statutes should be construed to avoid absurd results); *Lawson*, 670 F.3d at 68-69. We reject this forced distribution of "employee of" to the list of actors prohibited from retaliating against employees in violation of Section 806. The commentary accompanying the DOL's regulations implementing Section 806 explains Congress's reasoning for adding additional parties to the list of actors prohibited from retaliation.

> In addition to the general definitions, the regulations define "company" and "company representative" to together include all entities and individuals covered by Sarbanes-Oxley. The definition of "named person" includes the employer as well as the company and company representative who the complainant alleges in the complaint to have violated the Act. Thus, the definition of "named person" will implement Sarbanes-Oxley's unique statutory provisions that identify individuals as well as the employer as potentially liable for discriminatory action. We anticipate, however, that in most cases the named person likely will be the employer.

69 Fed. Reg. 52,105.

Section 806's use of "employee" is logically separate from the clause prohibiting actors from retaliation. After proscribing retaliation by several entities, Congress listed protections for employees without using words to limit which kind of employee was protected. As noted above, Congress easily could have limited "employee" to "employee of a company registered under Section 12 or required to file under Section 15(d) of the Exchange Act" in the text of the provision itself but chose not to.

In any case, the restrictive construction of the statute that DLA and the ALJ adopted results in an entirely implausible reading of the statute's language. Under such a reading, coverage of contractors, subcontractors, or agents would be limited to those contractors, subcontractors, and agents who have the ability to affect the terms, conditions, and privileges of employees of publicly traded companies – not their own employees. A successful Section 806 complainant may be entitled to reinstatement to his or her former employment and the award of back pay. But rarely would a contractor or especially a subcontractor be able to adversely affect the terms and conditions of an individual's employment with a publicly traded company – let alone be able to reinstate that individual to his or her former employment following successful suit against the contractor or subcontractor by the aggrieved employee. And if they did, the contractor or subcontractor would likely be an agent of the public company, thus rendering "contractor" and "subcontractor" superfluous. *Lawson*, 670 F.3d at 84-85 (Thompson dissenting).

That said, the statute's lack of definition of employee results in some ambiguity. Thus, we necessarily turn to other rules of statutory interpretation in defining the scope of employee coverage under Section 806.

2. Use of "Employees of Publicly Traded Companies" in Section 806's Title

The ALJ's conclusions and the Respondent's arguments urge the ARB to construe Section 806 to apply only to employees of publicly traded companies because of Section 806's caption, "employees of publicly traded companies," and similar statements found in its legislative history. We do not find the caption, "employees of publicly traded companies," to be controlling. As the Supreme Court said in *Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co.*:

> Th[e] heading is but a short-hand reference to the general subject matter involved. . . . [H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most [general] manner; to attempt to refer to each specific provision would often be ungainly as well as useless. . . . For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

331 U.S. 519, 528-29 (1947)

In this case, the oft-cited rule against treating statutory titles as controlling rings true. Neither the title nor the caption describes the full scope or complexity of Section 806's provisions. Several indicia and the text itself indicate that Congress held no such intention for Section 806 coverage. The phrase "employees of public companies" serves as shorthand for the typical complainant but not a concrete rule describing every complainant. Congress also used similar shorthand in the caption of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (Thomson/West 2007), "Discrimination against airline employees." But as we discuss below, the AIR 21 text includes coverage of employees of contractors and subcontractors. Moreover, the Dodd-Frank amendment added express coverage for employees of subsidiaries, affiliates, and statistical rating organizations to Section 806. Dodd-Frank, P.L. No. 111-203 § 929A, 124 Stat. 1848, 1852. While clarifying or adding coverage for employees of these private entities, Congress did not change Section 806's caption "employees of public companies." It did not feel the need to because it never intended for this shorthand to be a limitation on its intended coverage of employees of contractors, subcontractors, or agents.

As noted above, the ARB is bound by the DOL regulations.[14] During the notice-and-comment phase, one commentator argued that the proposed DOL regulations implementing Section 806 improperly extended coverage beyond the statutory language found in the caption. The DOL responded that regulations accurately reflect the text of Section 806.

> Plains AAP commented that the regulatory definitions of "employee" and "company representative" work together to broaden the statutory definition of protected employees. Specifically, Plains AAP commented that section 806(a) of the Sarbanes-Oxley Act is captioned "Whistleblower protection for employees of publicly traded companies," yet the definitions of "employee" and "company representative" in the regulations provide protection to employees of contractors and subcontractors of publicly traded companies. OSHA believes that the definitions in this section accurately reflect the statutory language. 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. Accordingly, OSHA does not believe that its regulatory definitions broaden the class of employees that are protected under the plain language of Sarbanes-Oxley.

69 Fed. Reg. 52,105-06.

Accordingly, we conclude that Congress did not intend for the content of the caption to limit coverage to only employees of publicly traded companies.

3. Legislative History Confirms Broad Coverage

Nothing in the SOX's legislative history indicates that Congress intended to limit whistleblower protection under Section 806 to only employees of publicly traded companies.[15] Indeed, denying coverage to employees of contractors, subcontractors, or agents runs counter to the goals of Section 806 and SOX generally. The purpose of the statute is to protect the investing market and the employees who blow the whistle on issuer-related activities contained

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[14] *See* 75 Fed. Reg. 3925 (Jan. 15, 2010); *Williams v. Am. Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010).

[15] *Lawson*, 670 F.3d at 86-87.

in Section 806. The Senate Report accompanying the amendment adding whistleblower coverage provided:

> The alleged activity Enron used to mislead investors was not the work of novices. It was the work of highly educated professionals, spinning an intricate spider's web of deceit. The partnerships – with names like Jedi, Chewco, Rawhide, Ponderosa and Sundance – were used essentially to cook the books and trick both the public and federal regulators about how well Enron was doing financially. The actions of Enron's executives, accountants, and lawyers exhibit a "Wild West" attitude which valued profit over honesty. . . .
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> Much of this conduct occurred with "extensive participation and structuring advice from [Arthur] Andersen," ("Andersen") which was simultaneously serving as both consultant and "independent" auditor for Enron.
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> With the assistance of Andersen and its other auditors, Enron apparently successfully deceived the investing public and reaped millions for some select few insiders. To the outside world, Enron and its auditors were either not reporting their massive debt at all, or were making "disclosures [that] were obtuse, did not communicate the essence of [Enron] transactions completely or clearly, and failed to convey the substance of what was going on between Enron and its partnerships". . . . In short, through the use of sophisticated professional advice and complex financial structures, Enron and Andersen were able to paint for the investing public a very different picture of the company's financial health than the true picture revealed. . . .

S. Rep. 107-146, 2002 WL 863249, at **2-3 (May 6, 2002) (internal footnotes omitted).

The 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. The Senate Report stated:

> As investors and regulators attempted to ascertain both the extent and cause of their losses, employees from Andersen were allegedly shredding "tons" of documents, according to the Andersen Indictment. . . .
>
> The apparent efforts to cover up any alleged misconduct by Enron or Andersen were not limited to Andersen and the destruction of physical evidence and documents. In a variety of instances when corporate employees at both Enron and Andersen attempted to report or "blow the whistle" on fraud, but [sic] they

> were discouraged at nearly every turn. For instance, a shocking e-mail from Enron's outside lawyers to an Enron official was uncovered. This e-mail responds to a request for legal advice after a senior Enron employee, Sherron Watkins, tried to report accounting irregularities at the highest levels of the company in late August 2001. The outside lawyer's [sic] counseled Enron, in pertinent part, as follows:
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> > You asked that I include in this communication a summary of the possible risks associated with discharging (or constructively discharging) employees who report allegations of improper accounting practices: 1. Texas law does not currently protect corporate whistleblowers. The supreme court has twice declined to create a cause of action for whistleblowers who are discharged * * *
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> In other words, after this high level employee at Enron reported improper accounting practices, Enron did not consider firing Andersen; rather, the company sought advice on the legality of discharging the whistleblower. . . .
>
> According to media accounts, this was not an isolated example of whistleblowing associated with the Enron case. In addition, a financial adviser at UBS Paine Webber's Houston office claims that he was fired for e-mailing his clients to advise them to sell Enron stock. A top Enron risk management official alleges he was cut off from financial information and later resigned from Enron after repeatedly warning both orally and in writing as early as 1999 of improprieties in some of the company's off-balance sheet partnerships. An Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices in 2000. These examples further expose a culture, supported by law, that discourage employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally. This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.

S. Rep. 107-146 at *4-5 (internal footnotes omitted).

Congress plainly recognized that outside professionals – accountants, law firms, contractors, agents, and the like – were complicit in, if not integral to, the shareholder fraud and

subsequent cover-up officers of the publicly traded Enron perpetrated. Construing Section 806 as only protecting employees of publicly traded companies would leave unprotected from retaliation outside accountants, auditors, and lawyers, who are most likely to uncover and comprehend evidence of potential wrongdoing. Congress was clearly concerned about the role Arthur Anderson played in the Enron "debacle" and the retaliation exercised against one of its partners who attempted to blow the whistle.[16]

The Respondents argue that congressmen repeatedly noted that SOX applies exclusively to public corporations registered with the SEC. 148 Cong. Rec. S. 7350, 7351 (July 25, 2002) ("[L]et me make very clear that it applies exclusively to public companies – that is, to companies registered with the Securities and Exchange Commission. It is not applicable to private companies, who make up the vast majority of companies across the country."); *see also* 148 Cong. Rec. S. 6493-95, S. 6330. The Respondents misconstrue these remarks, however, which address the comprehensive accounting requirements contained in the SOX Act and do not refer specifically to the whistleblower provisions. Read in context, these references to SOX applying only to "public companies" reflect a congressional aim to assuage the concerns of small private companies worried about the burden of SOX's regulatory regime. Congress sought to assure small business that the large publicly owned companies ultimately responsible to shareholders were the focus of SOX's regulatory requirements. [17]

4. The Statutory Framework

The Sarbanes-Oxley Act's overall statutory scheme further supports our broad interpretation of employee coverage under Section 806 as but another of the myriad means that Congress fashioned to combat fraud. *See Succar v. Ashcroft*, 394 F.3d 8, 26 (1st Cir. 2005) ("[t]he terms and provisions of [the text at issue] must be understood in the larger context of the statutory scheme). As the First Circuit explained, SOX "is a major piece of legislation bundling together a large number of diverse and independent statutes, all designed to improve the quality of and transparency in financial reporting and auditing of public companies." *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 9 (1st Cir. 2006). The Court also noted that "[t]he whistleblower protection provision codified in 18 U.S.C. § 1514A is a relatively small part of the Sarbanes-

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[16] It is even more difficult to imagine that Congress would have intended to leave unprotected outside counsel who are required under Section 307 of SOX to report evidence of material securities law violations. 15 U.S.C.A. § 7245, 17 C.F.R. Part 205. *See Jordan v. Sprint-Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 16 (ARB Sept. 30, 2009) ("SOX Section 307 requiring an attorney to report a 'material violation' should impliedly be read consistent with SOX Section 806, which provides whistleblower protection to an 'employee' . . . who reports such violations. Thus, attorneys who undertake actions required by SOX Section 307 are to be protected from employer retaliation under the whistleblower provisions of SOX Section 806.").

[17] As Senator Enzi explained: "Our intent with this bill is not to have the same principles that apply to the Fortune 500 companies apply to the mom-and-pop business. . . . We have taken a lot of care to be sure we are not cascading the provisions down to small business." 148 Cong. Rec. S6339 (July 8, 2002).

Oxley Act which is composed of many separate statutes and statutory schemes aimed at achieving the act's investor-protection goals." *Id.* at 5. An interpretation limiting protection of whistleblowers to those only directly employed by a publicly traded company would sabotage the overriding purpose of protecting investors. The overall statutory framework and purpose demonstrate, indeed require, that Section 806 protects whistleblowing by employees of contractors and subcontractors to the public company.

5. Section 806 Follows the Framework of Analogous Whistleblower Statutes

Finally, it should be recognized that our inclusive definition of "employee" under Section 806 reflects decades of Department of Labor precedent extending coverage under analogous whistleblower statutes to employees of contractors. Congress patterned Section 806 on similar whistleblower protection provisions in the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003 & Supp. 2011); AIR 21, 49 U.S.C.A. § 42121; and the Pipeline Safety Improvement Act of 2002 (PSIA), 49 U.S.C.A. § 60129 (Thomson/West 2007). S*ee* 69 Fed. Reg. 52,105. In particular, SOX's whistleblower-protection provisions very closely parallel the form of the employee-protection provision of Section 519 of AIR 21 codified at 49 U.S.C.A. § 42121. *See* Section 806, 18 U.S.C.A. 1514A(b)(2) (incorporating sections of AIR 21 by reference). AIR 21 provides:

> (a) DISCRIMINATION AGAINST AIRLINE EMPLOYEES. – No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) –

49 U.S.C.A. § 42121. And Section 806 of SOX provides:

> (a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES. – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(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.A. § 1514A.

AIR 21's initial operative paragraph (a) is in the form "no air carrier or contractor or subcontractor of an air carrier . . . may . . . discriminate." In Section 806, Congress included the same operative paragraph and form, "no [public company] . . . or any officer, employee,

contractor, subcontractor, or agent . . . may . . . discriminate." In Section 806, Congress added "officer," "employee," and "agent" to the list of actors prohibited from retaliating against whistleblowers in violation of Section 806. Both statutes include contractors and subcontractors within their definitions of employers, but neither AIR 21 nor Section 806 explicitly define employees covered under the respective statutes. Nevertheless, AIR 21 has long been interpreted to cover employees of contractors and subcontractors.[18] The same goes for the PSIA – it contains a definition of employer that includes a contractor or subcontractor but no definition of employee. Like AIR 21, it has nonetheless been interpreted to cover employees of contractors and subcontractors. *See generally Rocha v. AHR Util. Corp.*, ARB No. 07-112, ALJ Nos. 2006-PSI-001, -002, -003, -004 (ARB June 25, 2009).

For over 20 years, the ERA has been interpreted to include employees of contractors within its coverage, despite the fact that, like Section 806, it contains no statutory definition of "employee." In *Hill v. Tenn. Valley Auth.*, Nos. 1987-ERA-023, -024 (Sec'y May 24, 1989), the Secretary provided a detailed analysis of why employees of one of TVA's contractors had standing to sue TVA under the ERA. The Secretary explained that the ERA's statutory language was not limited in terms to retaliation against any *specific* employer's employees, thereby

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[18] *See generally Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, -121; ALJ No. 2006-AIR-022 (ARB June 30, 2009). In AIR 21 paragraph (d), Congress expressly excluded employees of air carriers, contractors, and subcontractors who engaged in deliberate violations of the law from coverage under the statute. 49 U.S.C.A. § 42121(d). By inference, Congress must have considered paragraph (a) to include employees of contractors and subcontractors or else it would have no need to exclude certain employees of contractors or subcontractors in paragraph (d) from coverage in paragraph (a).

Congress did not include this interpretive paragraph in Section 806. But the omission of this paragraph does not suggest that Congress intended the two coverage provisions to differ on this point, i.e., to exclude employees of contractors from Section 806 coverage. The legislative history of Section 806 indicated that Congress felt that another phrase, "lawful act," excluded those who were guilty of violations from coverage thus precluding the need to include a paragraph similar to (d) from AIR 21 in Section 806. The Senate Report accompanying the whistleblower amendment stated:

> Section 6 of the bill would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company. . . .
>
> This bill would create a new provision protecting employees when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent. Since the only acts protected are "lawful" ones, the provision would not protect illegal actions, such as the improper public disclosure of trade secret information.

S. Rep. 107-146, 2002 WL 863249 at **18-19 (May 6, 2002).

evincing a congressional intent to extend whistleblower protection beyond the traditional employer-employee relationship. Citing the magnitude of potential danger from the nuclear power industry and the fact that on-site employees of contractors are an important source of information about nuclear safety, the Secretary recognized a compelling need to afford them protection under the statute. Given the ERA's remedial nature and the attendant need to liberally construe it, the Secretary reasoned that excluding employees of contractors from coverage would frustrate the statute's remedial purposes. *See also St. Laurent v. Britz, Inc*., 1989-ERA-015, slip op. at 2 (Sec'y Oct. 26, 1992) ("Jurisdiction here does not depend upon a direct employer-employee relationship, but derives from the construction and application of the statute."). This reasoning applies with equal force in the context of Section 806.

Because these statutes share similar statutory language, legislative intent, and broad remedial purpose, they should be interpreted consistently. *See Poulos v. Ambassador Fuel Oil Co.*, No. 1986-CAA-001, slip op. at 5-7 (Sec'y Apr. 27, 1987); *Goldstein v. Ebasco Constructors, Inc.*, No. 1986-ERA-036, slip op. at 4 (Sec'y Apr. 7, 1992). The Secretary and courts have routinely looked to precedent interpreting one whistleblower protection statute for guidance in ascertaining congressional intent in another one. *See Bozeman v. Per-Se Tech., Inc.*, 456 F. Supp. 2d 1282 (N.D. Ga. 2006) (citing *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 3d 1365, 1374 (N.D. Ga. 2004)). In enacting Section 806, Congress modeled the legislation on the ERA, AIR 21, and PSIA and used terms that had an accumulated settled meaning under those predecessor statutes. *See* 69 Fed. Reg. 52,105. We find that Congress intended to cover employees of contractors under Section 806.

The Respondent, several ALJs, and the First Circuit in *Lawson* have voiced concerns over the breadth of covering employees of any contractors, subcontractors, or agents without limitation. The ALJ in *Charles* concluded that, "[t]o state that any privately held company under contract with a publicly traded company is a covered employer creates an exceptionally broad interpretation that is outside the scope of the Act." *Charles*, ARB No. 10-071, slip op. at 6. This concern is unfounded for two reasons. First, we are obliged to interpret Section 806 broadly both because it is a remedial statute and the legislative history encourages us to do so. *See Johnson*, ARB No. 08-032, slip op at 16. Second, we note that although the theoretical coverage of employees of any contractors, subcontractors, or agents of public companies might be broad, Section 806 contains built-in limitations including (1) its specific criteria for employees to have a reasonable belief of violations of specific anti-fraud laws or SEC regulations and (2) its requirement that the protected activity was a causal factor in the alleged retaliation.

In sum, we hold that accountants employed by private accounting firms who in turn provide SOX-compliance services to publicly traded corporations are covered as employees of contractors, subcontractors, or agents under Section 806.

CONCLUSION

Accordingly, we **REVERSE** and **REMAND** this case to the ALJ for further proceedings. Because we remand on the coverage issue and the case did not go to hearing on the merits,

DLA's cross-petition claiming that the ALJ failed to find that DLA would have terminated Spinner in the absence of protected activity would be inappropriate for agency review at this time. DLA is free to re-litigate this argument before the ALJ on remand. We **DENY** DLA's cross-petition for $1,000 in penalties against Spinner.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, concurring:

I concur with my colleagues in concluding that the whistleblower protection afforded by Section 806 of SOX, 18 U.S.C.A. § 1514A, applies to employees of contractors, subcontractors, and agents of publicly traded companies. I write separately because I am not convinced, in light of the contrary conclusion reached by the majority in *Lawson v. FMR, LLC*, 670 F.3d 61 (1st Cir. 2012), that my colleagues' analysis adequately addresses the basis for reaching the conclusion that Section 806's protection is not limited to only employees of publicly traded companies.

At the time this case arose, Section 806(a) provided 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. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(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 (1) to provide information . . . 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 Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. . . .[19]

[19] On July 21, 2010, Section 806(a) was amended pursuant to Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1848 (2010), to read as follows (with the additional language provided by the Dodd-Frank amendments highlighted in italics:

The Department of Labor regulations implementing Section 806, which the First Circuit concluded in *Day v. Staples*, 555 F.3d 42, 54 n.7 (1st Cir. 2009), are entitled to deference,[20] specifically provide that SOX's whistleblower protection extends to employees of contractors, subcontractors, and agents of publicly traded companies. The regulations define "employee" to include "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," and define "company representative" to mean "any officer, employee, contractor, subcontractor, or agent of a company."[21] As explained in the preamble accompanying the regulations' promulgation, Section 806 is viewed by the Department as

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> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(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 (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c),* 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 . . . 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 Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. . . .

In addition to adding nationally recognized statistical rating organizations to the listing of entities prohibited from retaliating against whistleblowers, the amendment clarified that reference in Section 806(a) to a company with a class of securities registered under section 12 or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 includes any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company. *See Johnson v. Siemens Bldg. Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011).

[20] The regulations were adopted pursuant to the Department of Labor's authority to enforce Section 806 by formal adjudication. *See* 18 U.S.C.A. § 1514A(b)(1). Whether the DOL regulations are or are not entitled to *Chevron* deference, *cf. Lawson v. FMR LLC*, 670 F.3d at 81-82, the ARB is obligated to follow them. *See* 75 Fed. Reg. 3925 (Jan. 15, 2010).

[21] 29 C.F.R. § 1980.101.

"protect[ing] the employees of publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies."[22]

As the majority notes, consistent with the Department's understanding, the ARB has consistently rejected interpreting Section 806 as protecting only employees of publicly traded companies, repeatedly interpreting SOX to afford whistleblower protection to employees of contractors, subcontractors or agents of publicly traded companies, regardless of the fact that the contractor, subcontractor or agent was not itself a publicly traded company. *See Charles v. Profit Inv. Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-040 (ARB Dec. 16, 2011); *Funke v. Federal Express Corp*., ARB No. 09-004, ALJ No. 2007-SOX-043 (ARB July 8, 2011); *Johnson v. Siemens Bldg. Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011); *Klopfenstein v. PCC Flow Techs.*, ARB Nos. 07-021, -022; ALJ No. 2004-SOX-011 (ARB Aug. 31, 2009) (*Klopfenstein II*); *Kalkunte v. DVI Fin. Servs. & AP Servs.*, ARB Nos. 05-139, -140; ALJ No. 2004-SOX-056 (ARB Feb. 27, 2009); *Gale v. World Fin. Grp.*, ARB No. 06-083, ALJ No. 2006-SOX-043 (ARB May 29, 2008); *Kukucka v. Belfort Instruments Co*., ARB Nos. 06-104, -120; ALJ Nos. 2006-SOX-057, -081 (ARB Apr. 30, 2008); *Klopfenstein v. PCC Flow Techs.*, ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006) (*Klopfenstein I*).

In reaching the contrary conclusion, that only employees of a publicly traded company are covered under Section 806, the ALJ in the instant case cited to and relied upon the ARB's decisions in *Flezar v. American Med. Ass'n*, ARB Nos. 07-091, 08-061; ALJ Nos. 2007-SOX-030, 2008-SOX-016 (ARB Mar. 31, 2009); *Paz v. Mary's Center for Maternal Child Care*, ARB No. 06-031, ALJ No. 2006-SOX-007 (ARB Nov. 30, 2007), and *Flake v. New World Pasta Co*., ARB No. 03-126, ALJ No. 2003-SOX-018 (ARB Feb. 25, 2004). However, as we pointed out in *Klopfenstein I*, the Board's decision in *Flake* (upon which both *Flezar* and *Pas* rely) did not address the question presented by the instant case:

> The complainant in *Flake* named one respondent: a company that was neither registered under § 12 of the Securities Exchange Act nor, as we determined, required to file reports under § 15(d). That respondent company did not have a public parent. Because we concluded that the company was not required to file under either provision, we held that it was not subject to the Act, noting that "the whistleblower provisions of [the Act] cover only companies with securities registered under § 12 or companies required to file reports under § 15(d) of the Exchange Act." Because there was no public parent involved, we did not have occasion to discuss

[22] 59 Fed. Reg. 52,104; 52,105-52,106 (Aug. 24, 2004). This expansive definition of "employee" under Section 806 reflects decades of Department of Labor precedent extending coverage under analogous whistleblower statutes to employees of contractors. *See* discussion, *infra* pp. 30-31.

> whether a non-public subsidiary of a public parent could be covered under the Act.[23]

Paz and *Flezar* similarly involved suit against non-publicly traded companies with no contractual or agency relationship to a publicly traded company.

Notwithstanding the ARB's consistent case authority to the contrary, the majority in *Lawson v. FMR, LLC*, 670 F.3d 61 (1st Cir. 2012), construed Section 806 to limit whistleblower protection to employees of publicly traded companies only. As the majority correctly notes, the ARB is not bound to accept the majority's holding in *Lawson* since the instant case is reviewable in another circuit.[24] Nevertheless, in light of the First Circuit's decision I agree with the majority that it is imperative to fully explain the basis for our interpretation of SOX as affording protection to employees of contractors, subcontractors, and agents of publicly traded companies.

Analysis begins, as it must, with the plain language of Section 806.[25] It is clear from its text that Section 806's prohibition against retaliation extends to publicly traded companies, their subsidiaries,[26] and any officer, employee, contractor, subcontractor, or agent of any such company or its subsidiary.[27] It is far less clear from the plain language of Section 806 who is protected from such retaliation.

The statute affords protection to "an employee" who engages in whistleblower activity without defining what is meant by "employee."[28] This lack of definition leaves the text of

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23 *Klopfenstein I*, ARB No. 04-149, slip op. at 13.

24 *See United States v. Mendoza*, 464 U.S. 154, 160 (1984); *Brizendine v. Cotter & Co.*, 4 F.3d 457, 462 n.4 (7th Cir. 1993); *Independent Petroleum Ass'n of America v. Babbitt*, 92 F.3d 1248, 1261-62 (D.C. Cir. 1996) (J. Rogers, dissenting).

25 As the Supreme Court has observed on numerous occasions, all statutory inquiries must begin with the language of the statute. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 431 (2000); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc*. 447 U.S. 102, 108 (1980). *See also* SINGER AND SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46.1 (7th Ed.).

26 *See Johnson*, ARB No. 08-032.

27 *See Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 6 (1st Cir. 2006) (Section 806 "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.")

28 The majority in *Lawson* draws a distinction between publicly traded companies and the other identified entities by categorizing the former as "employers" and the latter as "representatives of such employers." *Lawson*, 670 F.3d at 68. This is, however, a distinction without foundation. Section

Section 806(a) fraught with seemingly irreconcilable complexity in terms of employment relationships. One possible reading of the statute results in extending whistleblower protection to "an employee" of "any officer, employee, contractor, subcontractor, or agent" of a publicly traded company. However, this reading on its face results in the seemingly improbable extension of protection to an *employee of an employee* or *an employee of an officer* of a public company.[29] At the same time, it requires an equally constrained reading of the statute's language to conclude that its protection is limited to only employees of publicly traded companies. Section 806 prohibits publicly traded companies and the listed entities from discharging, demoting, suspending, threatening, harassing or in any other way discriminating against an employee with respect to the "terms and conditions of [his or her] employment." As the majority points out, because relief is afforded an aggrieved employee under the statute in the form of reinstatement to one's former employment and the award of back pay, it would be a rare occasion indeed for a contractor or subcontractor to comply with an order awarding such relief where in the equally rare occasion a contractor or subcontractor was found to have adversely affected the terms and conditions of an individual's employment with a publicly traded company. Because such nonpublic entities have no authority over the "terms and conditions" of a public company's employee's employment, an interpretation of Section 806(a) that identifies nonpublic entities such as contractors and subcontractors as entities prohibited from retaliating only against employees of public companies renders their inclusion surplusage. Similarly, if the contractor or subcontractor was merely acting on the publicly traded company's behalf in retaliating against the public company's employee, then the language of the statute prohibiting retaliation by contractors and subcontractors would be rendered superfluous since the acting entity would be barred from retaliation as a statutorily covered "agent" of the public company under Section 806(a). It is a fundamental rule of statutory interpretation that no construction be adopted that would render statutory words or phrases "meaningless, redundant or superfluous."[30]

If any meaning can be derived from Section 806 with clarity, it is that there is nothing within the plain language of the provision that limits protection to only employees of publicly traded companies. As the majority pointes out, Congress could easily have limited whistleblower protection to employees of publicly traded companies simply by statutorily defining the term "employee" or by adding the words "*of such company*" after the term

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806(a)'s opening phrase neither begins nor ends with a list of "employers," nor does Section 806(a) otherwise make this distinction.

[29] *See*, however, majority's discussion *infra*, pp. 7-8. The identification in Section 806(a) of "any officer, employee, contractor, subcontractor, or agent" of a publicly traded company is but a listing, consistent with provisions throughout Sarbanes-Oxley, of the non-public entities and individuals, in addition to public companies, whose activities are regulated by federal securities laws (see discussion, *infra*, pp. 28-29) and who are thus potentially liable for discriminatory action. See Department of Labor's commentary accompanying promulgation of Section 806's implementing regulations. 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004).

[30] *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985).

"employee." Yet Congress chose to do neither.[31] In the absence of plain language of limitation within Section 806(a), the conclusion that the whistleblower protection it affords is limited to employees of publicly traded companies is simply unsupportable. Nevertheless, the statute's extension of whistleblower protection to "an employee" is not without ambiguity, as demonstrated by the conflicting interpretations offered by the majority and dissent in *Lawson*.[32] Consequently, I agree with the majority that our analysis does not end here, and that we necessarily must resort to additional cannons of statutory construction to define the scope of employee protection under Section 806.

Consideration is thus given to the title of Section 806 within which Subsection 806(a) is housed[33] and the caption of Subsection 806(a) itself.[34] Neither, however, compels the conclusion that whistleblower protection is limited to only employees of publicly traded companies. Arguably both the title and the caption could be construed as limiting the protection Section 806 affords. However, while the Supreme Court has acknowledged that titles and captions may prove helpful aids in statutory interpretation, "[w]here the text is complicated and prolific," as is the case with SOX and Section 806, "headings and titles can do no more than indicate the provisions in a most general manner."[35]

My colleagues note that in the instant case the rule against treating statutory titles as controlling[36] "rings true." It is also true in the case before us that the statutory title and caption shed little light in clarifying the ambiguity found in the term "employee." To begin with, if the title and caption were interpreted as limiting protection to employees of publicly traded

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31 "Where 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 treatment." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotations omitted).

32 "Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." Singer, 2A SINGER AND SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45:2 (7th Ed.).

33 The title to Section 806 states that the section addresses "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud."

34 The caption found in the first line of the text of Subsection 806(a) similarly reads: "Whistleblower protection for employees of publicly traded companies."

35 *Brotherhood of R.R. Trainsmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528 (1947) (citations omitted).

36 *See, e.g., United States v. Johnson*, 632 F.3d 912, 924 (5th Cir. 2011); *Massachusetts Ass'n of Health Maint. Orgs. v. Ruthhardt*, 194 F.3d 176, 180 (1st Cir. 1999); *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 169 F.3d 474, 479 (7th Cir. 1999).

companies only, it would be "at the expense of the text itself."[37] If only employees of publicly traded companies are protected then, as previously discussed, it would leave the word "contractor" without any independent meaning. Of greater significance, however, is the fact that neither the title nor the caption describes the full scope of Section 806's provisions. Although Section 806(a) plainly extends coverage to two categories of public companies – those required to register pursuant to section 12 of the Securities Exchange Act of 1934 and those required to file reports under section 15(d) of the 1934 Act – only the first encompasses companies with publicly traded stock. Those required to file reports pursuant to section 15(d) are "public" only "in the sense that they have issued securities that may be sold to the public and are required to make periodic reports to their investors."[38] Although the title and caption make no reference to companies that are required to file reports, coverage under Section 806 is obviously not limited to "publicly traded companies" as the title and caption suggest. This point is accentuated by the recent Dodd-Frank amendments to Section 806 extending its prohibition against retaliation to any "nationally recognized statistical rating organization."[39] If Congress intended the title and caption to give meaning to the term "an employee," the title and caption would necessarily have been amended as part of the Dodd-Frank textual amendments to Section 806.

Further testament to the fact that the full scope of Section 806 is not described in the title or caption is the title's suggestion that SOX whistleblower protection is limited to "employees . . . who provide evidence of fraud." Yet, as the ARB recognized in *Sylvester v. Parexel Int'l*, the protection that SOX affords does not require in all instances that the employee provide evidence of fraud. Section 806 protects employees who provide information about conduct falling within three broad categories: (1) violations of specific criminal fraud statutes (18 U.S.C. §§ 1341, 1343, 1344, and 1348); (2) violations of any rule or regulation of the SEC; and (3) violations of federal law relating to fraud against shareholders. Only the first and third categories require evidence of fraud. "A violation of 'any rule or regulation of the Securities and Exchange Commission' could encompass a situation in which the violation, if committed, is completely devoid of any type of fraud."[40]

If Section 806 was intended to not only protect employees of publicly traded companies, but also employees of their related entities, it would still be reasonable to use the wording found in the title and caption given that all protected employees would have some connection to publicly traded companies, even if indirectly. The broader coverage of Section 806 is obviously too complex for its title. Consequently, I am in full agreement with Judge Thompson's

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37 *Massachusetts Ass'n of Health Maint. Orgs.*, 194 F.3d at 180.

38 *Lawson*, 670 F.3d at 66-67.

39 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, §§ 922(b), (c), 929A, 124 Stat. 1376, 1848, 1852 (2010).

40 *Sylvester v. Parexel Int'l.*, ARB No. 07-123, ALJ No. 2007-SOX-039, slip op. at 20 (ARB May 25, 2011). *Accord Day* , 555 F.3d at 54-55.

conclusion in *Lawson* that the title "merely describes a specific and common application of a more generally applicable statute."[41] I view the phrase "employees of publicly traded companies" as nothing more than a shorthand designation for ascertaining the typical employee protected under Section 806 rather than the identification of every covered employee.[42]

Turning to the legislative history of SOX, I am in agreement with the majority in sharing Judge Thompson's view that nothing in that history indicates that Congress intended to limit whistleblower protection under Section 806 to only employees of publicly traded companies.[43] The Senate conference report accompanying passage of SOX indicates that a key purpose of Section 806 is "to protect whistleblowers who report fraud against retaliation *by their employers*,"[44] but there is no mention of any imposed limitation on which, in any, employers are covered. There are statements by key members of Congress evidencing an intent to protect employees of publicly traded companies.[45] However, the protection of whistleblowers employed by public companies is not in dispute. The question is whether that protection is limited to only employees of public companies. Nothing in the congressional record expresses any intent to restrict Section 806 in this manner.[46]

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41 *Lawson*, 670 F.3d at 86 (J. Thompson, dissenting).

42 Congress used similar shorthand in the caption to the whistleblower protection provision of AIR 21, 49 U.S.C.A. § 42121, after which Section 806 of SOX was modeled in large part. *See* 18 U.S.C.A. § 1514A(b)(2)(A), (C). *See also* S. Rep. No. 107-146, at 30 (2002). Section 42121(a) is entitled, "Discrimination Against Airline Employees." Yet, the ARB has interpreted the text of the section as affording whistleblower protection to employees of contractors and subcontractors as well as air carriers. 29 C.F.R. § 1979.101. *See Wallum v. Bell Helicopters Textron*, ARB No. 09-081, ALJ No. 2009-AIR-006 (ARB Sept. 2, 2011); *Nagle v. Unified Turbines*, ARB No. 11-004, ALJ No. 2009-AIR-024 (Mar. 30, 2012).

43 *Lawson*, 670 F.3d at 86-87.

44 S. Rep. No. 107-146, at *1 (2002) (emphasis added).

45 *See, e.g.*, statements of Senator Leahy, Chairman of the Senate Judiciary Committee and a key sponsor of Section 806, that the provision "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud," 148 Cong. Rec. S1787 (daily ed. Mar. 12, 2002), that "[a]lthough current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors," *id*. at S1788, and that Section 806 "was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market." 149 Cong. Rec. S1725 (daily ed. Jan. 29, 2003). *See also* post-enactment statement of Sen. Cardin, 156 Cong. Rec. S3349 (daily ed. May 6, 2010) ("[t]he whistleblower provisions of the Sarbanes-Oxley Act protect employees of the publicly traded companies").

46 The Senate Judiciary Committee Report accompanying the Corporate and Criminal Fraud Accountability Act of 2002, the bill that became Title VIII of SOX of which Section 806 is a part,

Revealing Congress's intent that whistleblower protection is *not* limited to only employees of public companies is the Senate Judiciary Committee Report accompanying adoption of Section 806, S. Rep. 107-146 (2002). As explained therein, the notorious "Enron debacle," which served as a major impetus in the enactment of SOX's whistleblower protection provision,[47] involved misconduct by not only the publicly-traded Enron Corporation but the "accounting firms, law firms and business consulting firms" (*i.e*., privately-held contractors, subcontractors, and agents) who performed work for Enron.[48] Complicit in the shareholder fraud and subsequent cover-up in the face of investigation were not only Enron's corporate officers and directors but outside professionals "who helped create, carry out, and cover up the complicated corporate ruse when they should have been raising concerns."[49] Cited in particular was Arthur Anderson, a private accounting and auditing firm retained by Enron. Arthur Anderson not only facilitated Enron in the fraud and cover-up, but stifled its own employees' attempts at "blowing the whistle" on Enron's violations. "[W]hen corporate employees at both Enron and Anderson attempted to report or 'blow the whistle' on fraud, [] they were discouraged at nearly every turn." It was not only Sherron Watkins, a senior employee at Enron, whose retaliation for whistle blowing was highlighted. Also noted was the removal by Arthur Anderson of one of its partners from the Enron account who expressed reservations about the firm's financial practices and retaliation against a financial advisor at UBS Pain Webber who claimed that he was fired for e-mailing his clients advising that they sell their Enron stock.[50] These

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states that the provision "would provide whistleblower protection to employees of publicly traded companies." S. Rep. 107-146, at 13 (2002). However, it is not clear that this constitutes a statement that employees of non-public companies are specifically excluded from protection, or whether this is but a limited shorthand generalization. Similarly, in his introduction to the Senate Conference Report Senator Sarbanes stated that Sarbanes-Oxley "applies exclusively to public companies," *see* 148 Cong. Rec. S7350, 7351 (July 25, 2002), which on its face appears to suggest that only employees of public companies are protected, but just as easily could be interpreted to mean that Section 806 applies to public companies and those parties that act on their behalf (e.g., contractors, subcontractors, and agents) as opposed to private companies that provide no services to publicly traded companies. Moreover, Senator Sarbanes' introductory comment cannot in any way be construed as suggesting that SOX is limited to public companies, and thus that Section 806 does not extend to private companies. For example, SOX Section 307 applies to private attorneys who act as contractors or agents "in the representation of" a publicly traded company, and the creation of Public Company Accounting Oversight Board pursuant to Title I of SOX (Section 101 et seq.) necessarily applies to privately-held accounting and auditing firms doing work for publicly traded companies.

[47] The Senate report labeled the "Enron debacle" a "case study exposing the shortcomings in our current laws." S. Rep. 107-146, at 11.

[48] S. Rep. 107-146, at 4.

[49] *Id*. at 11.

[50] *Id*. at 5.

examples, the Senate report stated, "expose a culture, supported by law, that discourages employees from reporting fraudulent behavior," resulting in a "corporate code of silence [that] not only hampers investigations, but also creates a climate where wrongdoing can occur with virtual impunity."[51] Viewing the consequences of this "corporate code of silence" as "serious and adverse" for investors in publicly traded companies and the stock market generally, Congress enacted Section 806 in order to "encourage and protect [employees] who report fraudulent activity that can damage innocent investors in publicly traded companies" by providing federal protection to private corporate whistleblowers.[52]

From the foregoing it is clear that Congress was concerned about the involvement of contractors, subcontractors, and agents of public companies, as well as the public companies themselves, in performing and disguising fraudulent activities. Congress was no less concerned about protecting employees of such entities who attempt to report such activities. In the wake of the Enron scandal, Congress sought to protect investors in publicly traded companies and restore trust in the financial markets "by ensuring that the corporate fraud and greed may be better detected, prevented and prosecuted."[53] Thus, while Section 806's immediate purpose is "to protect whistleblowers who report fraud against retaliation by their employers,"[54] this was not intended as an end in and of itself. Congress recognized the important role whistleblowers play in deterring corporate fraud and SEC violations, noting that "often, 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."[55] As the ARB noted in *Johnson*, the principal sponsors of Sarbanes-Oxley and Section 806 "viewed protecting whistleblowers as crucial means for assuring that corporate fraud and malfeasance would be publicly exposed and brought to light from behind the corporate veil."[56]

If the overriding purposes of Sarbanes-Oxley are to be met, employees of contractors, subcontractors, and agents of publicly traded companies must be afforded the same protection against retaliation by their employer that is afforded employees of publicly traded companies. To construe Section 806 otherwise would effectively insulate from liability investment advisors and other private entities that employ virtually all those who perform work for investment companies such as mutual funds that are required to file reports under Section 15(d) of the

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51 *Id*.

52 *Id*. at 5, 19.

53 *Id*. at 2.

54 *Id*.

55 *Id*. at 10.

56 *Johnson*, ARB No. 08-032, slip op. at 14.

Securities Exchange Act. Nearly all mutual funds are structured such that they have no employees of their own, and instead contract with, and rely primarily upon, employees of privately-held investment advisors to function. Construing Section 806 as affording whistleblower protection to only employees of publicly traded companies would place employees of investment advisors, the very "insiders" whose reporting of fraud and securities violations Congress sought to encourage, outside the scope of SOX's whistleblower protection. Exclusion of the employees of investment advisors from whistleblower protection would thus defeat Section 806's primary purpose of protecting investors in mutual funds against fraud through the revelations of fraud and securities violations by "insiders" Section 806's protection is intended to encourage.[57]

Beyond leaving employees of investment advisors unprotected for reporting potential fraud and securities violations relating to their client funds, construing Section 806 as only protecting employees of publicly traded companies would leave outside accountants, auditors, and lawyers – those most likely to uncover and comprehend evidence of potential wrongdoing – unprotected from retaliation. As previously discussed, Congress was clearly concerned about the role Arthur Anderson played in the Enron debacle and the retaliation exercised against one of its partners who attempted to blow the whistle. The ARB has previously acknowledged the difficulty in imagining that Congress intended to leave unprotected lawyers who are required under Section 307 of SOX to report evidence of material securities law violations.[58]

To the extent that the Dodd-Frank amendments to Section 806 provide any indication of Congressional intent, it is that broad and unlimited whistleblower protection was intended. It is a well-settled proposition of statutory construction that at the time of any amendments to an existing statute, Congress is presumed to be aware of court and agency interpretations of the existing law.[59] At the time of adoption of Dodd-Frank in 2010, the Department of Labor had issued notice-and-comment regulations explicitly providing that Section 806 applied to employees of contractors, subcontractors, and agents of publicly traded companies. Thus, as Judge Thompson insightfully pointed out in *Lawson*, in enacting Dodd-Frank "Congress had a miles-wide opening to nip Labor's regulation in the bud if it had wished to do so. It did not."

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[57] Investment advisors to mutual funds constitute a substantial industry with nearly 157,000 employees managing more than $12 trillion on behalf of investors. *See 2010 Investment Company Fact Book*, Chapter 1 (available at http://www.icifactbook.org/pdf/2010_factbook.pdf).

[58] *See Jordan v. Sprint-Nextel Corp*., ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 16 (ARB Sept. 30, 2009).

[59] *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

Consideration of the overall statutory framework of SOX lends further support to construing Section 806 broadly to include within its protective coverage employees of contractors, subcontractors and agents of public companies.

We begin our analysis in this regard at its most obvious statutory focal point: with a comparison of the language of Section 806(a) to the explicitly narrower anti-retaliation provision found at Section 501(a) of Sarbanes-Oxley. 15 U.S.C.A. § 78*o*-6(a)(1)(C) prohibits "a broker or dealer and persons employed by a broker or dealer who are involved with investment banking activities" from retaliating against "any securities analyst *employed by that broker or dealer or its affiliates*." (Emphasis added). Congress could have similarly limited the protection afforded under Section 806(a) but, as previously noted, chose not to do so; resulting in a compelling argument that Congress fully intended a broad extension of whistleblower protection under Section 806.[60]

Equally if not of greater significance to a proper construction of Section 806's employee protection coverage is the larger statutory context within which Section 806 exists. While Section 806's immediate purpose is, as previously noted, the protection of whistleblowers against retaliation by their employers, the provision was enacted as part of a broad and multi-faceted Congressional effort to close gaps in the securities laws that the Enron debacle exposed with the goal of protecting investors and restoring public confidence in the securities market.[61] In furtherance of this over-arching goal, Sarbanes-Oxley consists of multiple means of combating fraud and protecting investors through numerous diverse and independent statutes and regulatory schemes "designed to improve the quality and transparency in financial reporting and auditing of public companies."[62] Titles I and II of SOX expand oversight and regulation of accounting firms and outside auditors who are not themselves employed by public companies in order to "protect the interests of investors and further the public interest in the preparation of . . . accurate[] and independent audit reports for companies the securities of which are sold to, and held by and for, public investors."[63] Title III, entitled "Corporate Responsibility," imposes

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60 Regarding Section 1107, "[t]he other whistleblower provision found in [SOX]" of which the majority in *Lawson* took note, 670 F.3d at 71, there is no meaningful comparison that can be drawn. Unlike Section 806(a), which expressly affords whistleblower protection to individuals who are wronged, Section 1107, which amended 18 U.S.C.A. § 1513, is an obstruction-of-justice provision that imposes criminal sanctions *upon the wrongdoer* but affords no protection to the wronged individual.

61 The Senate Judiciary Committee report accompanying adoption of the bill that became Title VIII of SOX, of which Section 806 is a part, describes the bill as "crucial" to "restoring trust in the financial markets by ensuring that corporate fraud and greed may be better detected, prevented and prosecuted." S. Rep. 107-146, at 2. *See Johnson*, ARB No. 08-032, slip op. at 12.

62 *Carnero*, 433 F.3d at 9.

63 SOX § 101, 15 U.S.C.A. § 7211. *See also*, SOX §§ 102-108, 15 U.S.C.A. §§ 7212-7218; SOX §§ 201-206, 15 U.S.C.A. §§ 7231-7234, 15 U.S.C.A. § 78j-1(*g*)-(*l*).

requirements on publicly traded companies designed to ensure the independence of retained public accounting firms and other professional entities with respect to audits, financial reporting, and securities law compliance.[64] For example, recognizing the significant roles that attorneys and securities professionals can play in both preventing and participating in securities laws violations.[65] Congress included Section 307, which directs the SEC to issue rules regulating the conduct of attorneys retained by a public company in connection with matters involving the public company's securities, regardless of whether the attorney is employed in-house by the company or contractually retained.[66]

Title IV of SOX, governing enhanced financial disclosure requirements, similarly imposes obligations on non-public entities in addition to publicly traded companies.[67] Title V defines codes of conduct and conflict of interest disclosure requirements applicable to outside securities analysts, registered brokers, dealers, and affiliates.[68] Title VI details the SEC's authority to censure or bar from practice outside securities professionals such as brokers, investment advisors, and dealers.[69] Title VII requires the Comptroller General and the SEC to report on securities violations by securities professionals (including public accounting firms, attorneys, brokers, dealers, investment advisors) and on whether investment banks and financial advisors assisted public companies in manipulating earnings or in otherwise disguising their financial condition.[70] Finally, Titles VIII and IX of Sarbanes-Oxley contain broadly applicable provisions imposing criminal liability for securities fraud and obstruction of justice beyond publicly traded companies.[71]

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64 *See* SOX § 301, 15 U.S.C.A. § 78j-1; SOX §§ 302-308, 15 U.S.C.A. §§ 7241-7246.

65 *See* S. Rep. No. 107-146, at 2-5.

66 15 U.S.C.A. § 7245 requires the SEC to issue rules, "for the protection of investors," setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of public companies, including the requirement that any attorney engaged on behalf of a public company internally report evidence of violations of securities law or breach of fiduciary duty or similar violation by the company or its agents. *See also* 17 C.F.R. § 205.

67 *See* SOX §§ 401-408, 15 U.S.C.A. §§ 7261-7266.

68 SOX § 501, 15 U.S.C.A. § 78*o*-6.

69 *See* SOX §§ 602-604, 15 U.S.C.A. §§ 77t(g), 78d-3, 78*o*, 14 U.S.C.A. § 80b-3.

70 *See* SOX §§ 701-705, 15 U.S.C.A. § 7201 note.

71 *See* SOX §§ 802, 807, 902, 906, 18 U.S.C.A. §§ 1348, 1349, 1350, 1519, 1520.

Viewed within this context, it is readily apparent that the identification of publicly traded companies and other entities and individuals against whom Section 806's anti-retaliation bar applies is but a listing, consistent with provisions throughout Sarbanes-Oxley, of the public companies, non-public entities, and individuals whose activities are regulated by federal securities laws. The fact that Congress chose different mechanisms for regulating different non-public entities depending on their respective and varying roles and responsibilities under the securities laws does not negate extension of whistleblower protection under Section 806 to their employees. To the contrary, given the role Section 806 is intended to serve in achieving the larger purposes of Sarbanes-Oxley, whistleblower protection necessarily must be afforded employees of contractors, subcontractors, and agents of publicly traded companies. For example, pursuant to Section 307 of SOX, 15 U.S.C.A. § 7245, an attorney contractually retained as outside counsel to represent a public company before the SEC is obligated to internally report material violations of the securities laws by the public company. Failure to do so will result in civil penalties, including censure and prohibition from practice before the SEC.[72] This provision would be rendered virtually meaningless without the whistleblower protection afforded by Section 806(a), particularly where the attorney with knowledge of securities violations is an employee of a law firm that has been contractually retained by a publicly traded company.

Within the overall statutory framework of SOX an even more compelling argument exists for interpreting Section 806(a) as extending whistleblower protection to employees of contractors, subcontractors, and agents when one considers the fact that companies required to file reports under Section 15(d) of the Securities Act such as mutual funds do not themselves have employees. Throughout Sarbanes-Oxley, Congress consistently imposes regulations, obligations, and sanctions upon the contractors, subcontractors, and agents of such companies.[73] These provisions and related SEC rules expanded the reach of SEC regulations, identifying additional contractors and certain of their employees as covered persons under the securities laws in connection with their employer's contracts to provide to public companies services regulated by the securities laws. Congress's purpose in enacting SOX fully accords with a reading of the statute to afford whistleblower protection coverage under Section 806 to the employees of contractors, subcontractors, and agents who are covered persons under the securities laws.

The fact that Congress previously established a regulatory scheme governing the regulation of public investment companies, such as mutual funds, and the conduct of their

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[72] *See* 17 C.F.R. § 205.

[73] *See, e.g.*, SOX §§ 101-107, 203-206, 602, 802 (regulating public companies' outside auditors and accountants); SOX §§ 201-202, 301 (requiring and regulating contracts between public companies and their outside auditors and accounting firms); SOX § 307 (regulating securities lawyers who are involved "in any way" in a public company's financial disclosures to investors); SOX § 501 (regulating public companies' investment bankers and securities underwriters); and SOX § 806 (regulating public companies' contractors).

investment advisors,[74] does not detract from our conclusion. Because of these prior enactments, obviously, SOX focuses little attention on the regulation of advisors to such public entities. However, it does not follow that, as a result, Section 806(a) does not afford whistleblower protection to employees of private companies under contract to provide investment advice to funds organized under the ICA. It is simply too large a segment of the securities industry to presume that Congress did not intend Section 806 to afford protection to employees of contractors or subcontractors retained as investment advisors. Congress could have easily provided an explicit exception for mutual funds/investment funds organized under the ICA, as it did in Section 405, if it had wanted to do so. But Congress did not do so. The ICA and SOX were both enacted to protect investors. It thus requires perverse logic to conclude that Congress intended through a non-intuitive and convoluted combination of two separate Acts, rather than by express statutory language, to exempt the one class of employees from whistleblower protection that would be aware of securities violations by public investment companies, i.e., employees of their contractors, subcontractors, and agents.

Finally, I join my colleagues in referencing the ARB's interpretation of analogous whistleblower statutes, which have been held to afford protection to employees of contractors and subcontractors. Section 806 was based in part on the Wendall H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[75] The relevant provision of AIR 21 is entitled "Discrimination against airline employees," and reads: "No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee."[76] This structure parallels Section 806's: "No company . . . or any . . . contractor, subcontractor or agent of such company, may discharge . . . or in any other manner discriminate against an employee." Just as in Section 806, AIR 21 does not specify whether it protects employees of carriers only or whether it protects employees of contractors and subcontractors as well. Nevertheless, as the majority notes, the ARB has construed AIR 21's provision as extending whistleblower protection to employees of contractors and subcontractors of air carriers.[77] The Pipeline Safety Improvement Act of 2009 (PSIA), 49 U.S.C.A. § 60129(a), contains a definition of employer which includes a contractor or subcontractor but no definition of employee. Nevertheless, the PSIA has been interpreted as protecting employees of contractors and subcontractors.[78] Likewise, the Energy Reorganization Act (ERA), 42 U.S.C.A.

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[74] *See, e.g.*, Investment Company Act of 1940 (ICA), 15 U.S.C.A. § 80a et seq.; Investment Advisors Act of 1940 (IAA), 15 U.S.C.A. § 80b et seq.

[75] *See* S. Rep. 107-146, at 26.

[76] 49 U.S.C.A. § 42121(a).

[77] *See, e.g., Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, -121; ALJ No. 2006-AIR-022 (ARB June 30, 2009).

[78] *See, e.g., Rocha v. AHR Utility Corp.*, ARB No. 07-112, ALJ Nos. 2006-PSI-001, -002, -003, -004 (ARB June 25, 2009).

§ 5851(a), has also been interpreted to include employees of contractors within its protection despite the fact that, like Section 806, it contains no statutory definition of "employee."[79] These whistleblower statutes share similar statutory language and a legislative intent evidencing similarly broad remedial purposes. Consequently, the ARB has sought to interpret their respective provisions consistently.[80] Congress having modeled Section 806 of SOX on the whistleblower protection provisions of the ERA, AIR 21, and PSIA, and employed terms, which have an accumulated settled meaning under those predecessor statutes, I can find no compelling reason to now depart from the Board's practice of construing these whistleblower laws in a consistent fashion.

Section 806 prohibits any "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" from retaliating against "an employee" who engages in whistleblower protected activity. By this express language, Congress linked whistleblower protection coverage under Section 806 with the Securities Exchange Act provisions requiring publicly traded companies to fully disclose financial information to investors and the SEC. Congress clearly understood that in order to achieve the Act's overall purposes Section 806 necessarily had to afford whistleblower protection against all entities and individuals involved in securities related activities. Consequently, any reasonable interpretation of employee coverage under Section 806 must preserve this connection between protecting whistleblowers and ensuring compliance with securities law disclosure requirements.

Moreover, it goes without saying that Sarbanes-Oxley in general and Section 806 in particular are remedial in nature. SOX was enacted "to address the systemic and structural weaknesses affecting our capital markets, which were revealed by repeated failures of auditing effectiveness and corporate financial and broker-dealer responsibility in recent months and years."[81] As part of the Corporate and Criminal Fraud Accountability Act of 2002, which became Title VIII of SOX, Section 806 is designed to remedy a company's firing of an employee for reporting fraud or other securities law violations, thereby facilitating SOX's overall purpose of protecting investors and capital markets.[82] The Supreme Court has repeatedly recognized that, "securities laws combating fraud should be construed 'not technically and restrictively, but

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79 *See, e.g., Robinson v. Triconex Corp*., ARB No. 10-013, ALJ No. 2006-ERA-031 (ARB Mar. 28, 2012); *Hill v. Tenn. Valley Auth.*, Nos. 1987-ERA-023, -024 (Sec'y May 24, 1989).

80 *See, e.g., Goldstein v. Ebasco Constructors, Inc.*, 1986-ERA-036, slip op. at 4 (Sec'y Apr. 7, 1992); *Poulos v. Ambassador Fuel Oil Co.*, No. 1986-CAA-001, slip op. at 5-7 (Sec'y Apr. 27, 1987).

81 S. Rep. No. 107-205, at 2 (July 3, 2002).

82 S. Rep. No. 107-146, at 2.

flexibly to effectuate [their] remedial purposes.'"[83] Thus where Section 806's language and the statutory scheme in which Section 806 resides support a broad reading that comports with its remedial purpose, we read Section 806 as protecting employees of contractors, subcontractors, and agents of public companies from retaliation for engaging in whistleblower protected activities.

Consequently, for the foregoing reasons I concur with the majority in reversing and remanding this case to the ALJ for further proceedings.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

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[83] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-87 (1983) (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963)). *See also Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); SINGER AND SINGER, 3 SUTHERLAND STATUTORY CONSTRUCTION § 60:1 (7th ed. 2010).