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CASE NO.: 2015-SOX-00007

IN THE MATTER OF

SCOTT PLUTZER
Complainant

v.
UNITED SERVICES AUTOMOBILE ASSOCIATION
Respondent

ORDER DISMISSING COMPLAINT AND CANCELLING HEARING

This case arises out of Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX" or "the Act"), technically known as the Corporate and Criminal Fraud Accountability Act, P.L. 107-204 at 18 U.S.C. §1514A *et seq.*, and the employee protective provisions promulgated hereunder at 29 C.F.R. Part 1980. Under SOX, the Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees of publicly-traded companies who are allegedly discharged, retaliated against, or otherwise discriminated against, with regard to their terms and conditions of employment, for providing information about fraud against company shareholders to supervisors, federal agencies, or members of Congress.

I. BACKGROUND

A. Procedural History

On November 6, 2014, Scott Plutzer ("Complainant") filed his original complaint with the Occupational Safety and Health Administration ("OSHA") where he alleged retaliation by his former employer, United Services Automobile Association ("USAA" or "Respondent") after he expressed concerns of "illegal and fraudulent insurance practices against its own membership." (Compl., p. 2).

On November 10, 2014, the Secretary of Labor found that because neither Complainant nor Respondent is covered under SOX, OSHA lacked jurisdiction to conduct any further investigation in this matter. On December 10, 2014, Complainant filed an objection to OSHA's findings and a request for a hearing.

On January 23, 2015, Complainant filed a Complaint and Demand for Hearing with the undersigned in which he provided more detail about the alleged protected activity and alleged retaliatory acts by Respondent.

B. Alleged Protected Activity by Complainant and Alleged Retaliation by Respondent

Complainant began working for Respondent on October 22, 2007 as he was hired to manage the newly-formed Uninsured Motorist Subrogation recovery team. Complainant's department handled approximately one-third of the uninsured motorists' claims for USAA. In Complainant's 2011 performance evaluation, his direct manager, Demetrius Donseroux, wrote that Complainant's unit produced "world class results" as it outperformed third-party vendors by a 2:1 ratio and was responsible for $3.6 million (52 percent) of the total $6.9 million subrogation dollars collected. (Compl., p. 2; EX-1). In August 2012, Plutzer was reassigned to Senior Agency Coordinator. In this position, he was responsible for overseeing the collection efforts of two external agencies: AFNI and Wilber. In his new position, Plutzer alleged that more than 10,000 claims were improperly handled in USAA's system dating back to 2007. He reviewed and resolved approximately 2,000 of the seriously delinquent claims and recorded his findings on a spreadsheet.

In late November 2012, Complainant reported his "concerns of USAA's noncompliance" to Donseroux and analyst Brandy LaMaster. According to Complainant, both were dismissive of his concerns, even after explaining that "USAA is obligated by law to reimburse the USAA member." (Compl., p. 6). The following morning, he filed an ethics complaint with USAA Senior Ethics Program advisor Rachel Flint. Flint, he added, took Complainant's concerns very seriously, and an audit was performed on the claims Complainant had identified. (*Id.*).

In early December 2012, the ethics complaint was reported to Donseroux and "AVP" Doug Smock. Complainant was subsequently placed on a Performance Improvement Plan. (Compl., pp. 6-7.)

The audit was completed around January 15, 2013, and its findings substantiated concerns that USAA members had not received the reimbursements they were due. According to Complainant, a total of 821 members were identified as being owed their deductible, and the cumulative total owed to them was $218,000. USAA paid out the reimbursements. Another 688 members were identified as being owed partial reimbursements, yet, according to Complainant, he and others were directed not to submit a request for reimbursement for those USAA members. He again was concerned that not reimbursing the USAA members was "in direct conflict with insurance regulations for states that require a pro rata reimbursement." (Compl., p. 8).

In January 2013, Complainant was informed that his reassignment to Senior Agency Coordinator was temporary, and he would have to reapply for his position. He applied for the post. One week later, he was told the position would go unfilled. He felt this was retaliation for filing the ethics complaint. (Compl., p. 9).

On February 8, 2013, Complainant received his 2012 performance evaluation. The evaluation noted that "his technical knowledge of collections is second to none" and how well he communicated with his team and pushed them to exceed expectations. (Compl., EX-5). However, he was downgraded to an overall rating of "partially met expectations" and because he "struggled with communicating with certain members of his direct reports." (Compl., p. 9; EX-

5). He was told he would receive only 50 percent of his bonus and would not receive a merit raise, which he, again, felt was done in retaliation for the ethics complaint and exposing the noncompliant subrogation activity. (*Id*).

Complainant was diagnosed with stomach cancer, had surgery, and returned to work in March 2013. (Compl., p. 10). He was told upon returning to work that he would be transferred out of the UM Subrogation Department and into an Analyst I position in the Enterprise Money Movement Department. Over the next few months, Complainant contested the rating and language found in his performance evaluation. He contends that although he was told there would be some "corrections" to his 2012 evaluation regarding the bully statement, they were never made. (*Id*. at p. 12).

Complainant acknowledged that he struggled in his new position and felt as though he was being set up to fail in retaliation for his earlier ethics complaint. He continued to express to his new manager, Lori Polhamus, that the concerns he brought forth beginning in late 2012 were not completely addressed. (Compl., pp. 12-13).

During the second half of 2013, Complainant reapplied for positions within the Subrogation department and was granted interviews for the posts. Despite 12 years of experience plus experience running the department at USAA, he was not hired. Complaint felt as though he had been "blackballed." (Compl., p. 14).

In December 2013, Complainant complied with all of the requirements of his PIP, and the matter was closed. However, in January 2014, he was placed on a new PIP which focused on his performance and difficulties in his new role as an Analyst I. (Compl., p. 14; EX-7).

In February 2014, Complainant received another poor performance evaluation. He spent time away from work due to illness and returned on April 1, 2014. The next day, he was informed by his new manager, Sonia Peck, that he had been placed on a Final Notice. (Compl., p. 16).

On two occasions in April 2014, Complainant stated that he was falsely accused by co-workers of breaking company policy, only to be exonerated in both situations. (Compl., pp. 16-17).

On April 23, 2014, Complainant emailed USAA CEO Joe Robles to address the "illegal treatment he suffered, including 1) retaliation and severe emotional distress; 2) Family Medical Leave Act violations; and 3) overtime violations." (Compl., EX-13). He also requested an investigation and stated that he was seeking protection from "illegal retaliation." (*Id*). A human relations advisor was assigned to address his concerns.

On April 28, 2014, Complainant met with Grace Fawcett, the human relations advisor, about the alleged retaliation, but saw no progress. On April 30, 2014, Complainant emailed a vice president of HR, Dana Simmons, and ethics advisor Flint, expressing his concerns that his request for an investigation into issues of retaliation was not being conducted fairly or properly. (Compl., p. 19; EX-16).

Throughout May 2014, he continued to email top officials at USAA, including CEO Robles, about his concerns regarding retaliation and the investigation. On May 22, 2014, AVP Gloria Guerra and Fawcett informed Complainant that he was being placed on indefinite administrative leave. He was escorted by security off the USAA premises. (Compl., pp. 20-21).

On May 23, 2014, Complainant spoke to local television station KENS – Channel 5 in San Antonio, Texas regarding the insurance subrogation concerns he raised "so that any and all members would have an opportunity to contact USAA to verify if they were entitled to reimbursement that had been withheld by the company." (Compl., p. 22).

On May 30, 2014, Complainant received a phone call from Respondent, where Ms. Peck informed him that he was being terminated effective that day. The reason given for his termination was due to "disclosing privileged information." (Compl., p. 22).

On June 5, 2014, Plutzer met with the Texas Department of Insurance (DOI) in Austin, Texas, where he reviewed the details of "illegal insurance practices" that were documented in his complaint. (Compl., p. 23). According to Complainant, the Texas DOI informed him that a National Market Conduct Investigation of USAA would be conducted in conjunction with other state DOIs. *Id*.

C. Respondent's Answer and Request for Relief

On February 2, 2015, Respondent filed an Answer and Request for Relief stating that as a reciprocal inter-insurance exchange and unincorporated association organized under the laws of Texas which is not publicly-traded, does not have securities registered under Section 12 of the Securities and Exchange Act of 1934, and is not required to file reports under Section 15(d) of the Act, it is not covered by the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A. (Answer, pp. 1-2).

Regarding Complainant's allegations of protected activity and retaliation, Respondent denied it has engaged in any unlawful or fraudulent conduct in general and any unlawful conduct against Complainant. Respondent admitted that Complainant raised concerns to his direct managers, the ethics department and executive management, and that he filed complaints with various state Departments of Insurance in various states, but argued that none of this is protected activity under SOX. (Answer p. 6). Respondent acknowledged that Complainant filed an ethics complaint on November 30, 2012, and an audit commenced shortly after. (Answer, pp. 8-10). In addition, Smock announced that an audit would be conducted in response to an ethics complaint, the audit identified that some USAA members were entitled to partial reimbursements, and USAA paid out reimbursements to the members entitled to receive them. (*Id*.). However, Respondent reiterated that these events do not trigger the employee whistleblower protection provided by SOX, and thus USAA is not a covered respondent. (*Id*. at pp. 2-5).

The Court held three conference calls with the parties on February 2, February 3, and February 9, 2015 in an attempt to bridge the gap between Complainant and Respondent regarding the provisions of Respondent's request for a protective order. During the conference

call on February 9, 2015, Complainant discussed his assertion that Respondent's business relationships with publicly-traded companies, specifically TrueCar, make Respondent subject to the employee whistleblower provisions of SOX in light of the Supreme Court's recent decision in *Lawson v. FMR LLC*, 134 S.Ct. 1158, 188 L.Ed. 2d 158, 2014 U.S. LEXIS 1783 (Mar. 4, 2014).

The undersigned decided to determine the issue of jurisdiction before taking any further action in this matter. An Order to Show Cause was issued on February 10, 2015 in which Complainant was ordered to show why jurisdiction of this Court exists. Contemporaneous with Complainant's response to the Order, Respondent was ordered to file its position on this issue. As part of its response, Respondent was directed to address its contractual relationship with TrueCar, specifically whether USAA provides any services to TrueCar in relation to TrueCar's registration of securities under Section 12 of the Securities and Exchange Act of 1934 and/or TrueCar's requirement, if any, to file reports under Section 15(d) of the Act.[1]

D. Contentions of the Parties

1. Complainant

Complainant does not dispute that standing alone as a Texas reciprocal inter-insurance exchange, USAA is not a covered employer under SOX. However, Complainant contends that as an employee of a "contractor" of a publicly-traded company or a company required to file reports under Section 15(d), he is therefore a covered employee under SOX. He cites 18 U.S.C. § 1514A and *Lawson* for support. Complainant argues that "USAA has many contractual arrangements with publicly-traded companies that are promoted on [USAA's] website," including ADT, Care.com, FTD, D.R. Horton, FedEx, Avis Budget Group, and TrueCar. (Compl. Resp., p. 8). He contends that by raising concerns to his supervisors about insurance subrogation reimbursements to USAA members because these "illegal and fraudulent practices, if not corrected, could adversely affect the many partnerships that rely on USAA members' business through their internet website," he engaged in SOX protected activity. (*Id.*).

Regarding TrueCar, Complainant cites the SEC Form 10-Q filed by TrueCar for the quarter ending June 30, 2014 to show that a contractual relationship exists between the two entities, and he discusses the car-buying site TrueCar maintains for USAA. According to Complainant, page 39 of the 10-Q states that "[a]ny adverse change in our relationship with United Services Automobile Association, or USAA, could harm our business." (Compl.'s Resp., p. 9).[2] Also, a contractual relationship exists because the parties owe money to each other, as outlined in the report filed with the SEC. (*Id.* at pp. 9-10).[3] Therefore, in light of *Lawson*,

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[1] TrueCar has referred to USAA as being one of its "affinity group marketing partners." *About Us – TrueCar*, TrueCar.com, *available at:* https://www.truecar.com/about_us.html (last visited March 17, 2015). It operates a car-buying platform for partners such as USAA, Consumer Reports, and others. *Id.*

[2] *See also TrueCar, Inc. Form 10-Q (Quarterly Report)*, EdgarOnline, *available at*: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=4&ved=0CDIQFjAD&url=http%3A%2F%2Fwww.fool.com%2Fp%2F60%2Fwww.motleyfoolp.idmanagedsolutions.com%2Fwidgets%2FsecFilings%2Fdownload%3Fid%3D10150822%26downloadType%3Dpdf&ei=7FMHVd7zH838gwSh2oLwBw&usg=AFQjCNFj16NS24bRknZmVbzGWNzKiiS5Fw (last visited Mar. 16, 2015).

[3] *TrueCar Form 10-Q*, at. p. 17.

"privately held companies such as Respondent can be held accountable under the provisions of SOX when their actions can or do adversely affect the shareholders of the publicly-traded company they contract with." (*Id*. at p. 12).

2. Respondent

Respondent contends that based on the legal standards for determining coverage under SOX, Complainant's claim does not encompass SOX's employee whistleblower protections. Respondent outlines the following as the basis for its dismissal:

- USAA is not a publicly-traded company;
- Mr. Plutzer was not, as a USAA employee, an employee of a publicly-traded company;
- Mr. Plutzer did not complain to USAA or any entity specified in Sarbanes-Oxley of a violation of the anti-fraud laws or SEC regulations specified in Sarbanes-Oxley;
- Mr. Plutzer did not complain that the deductible reimbursement concern he raised to USAA in November 2012 was part of a fraud against the shareholders of any publicly-traded company, including TrueCar – nor can he;
- TrueCar was not publicly traded in November 2012; and
- USAA was not in November 2012, nor was it at any time, a contractor of TrueCar, nor, more specifically, was USAA a contractor in relation to TrueCar's registration of securities under Section 12 of the Securities and Exchange Act of 1934 and/or TrueCar's requirement, if any, to file reports under Section 15(d) of the Act.

(Respondent's Resp., pp. 5-6). Respondent argues that Complainant has failed to plead coverage sufficiently to avoid dismissal, as his original complaint expresses his belief that USAA violated various state insurance laws, not the federal laws specified in SOX nor of USAA's involvement, by way of the alleged delayed reimbursements, in perpetrating a fraud on the shareholders of a public company as the contractor of that company. (*Id*. at pp. 7-8). Further, Complainant's newly proffered bases for coverage regarding "mail fraud" (18 U.S.C. § 1341) being conducted by "*not mailing*" USAA members' reimbursement checks timely and USAA as an alleged "contractor" of TrueCar are insufficient to avoid dismissal. (*Id*. at p. 8-10).

II. DISCUSSION

The central issues in resolving the question of jurisdiction in this matter are 1) whether Complainant is a protected person under SOX; 2) whether USAA is a covered respondent; and 3) whether Complainant's reports of concerns about insurance subrogation reimbursements for USAA members to USAA managers and executives are protected activities under SOX because USAA's alleged acts may damage its "relationships" with publicly-traded companies, and this could result in fraud against the shareholders of publicly-traded companies, namely TrueCar which, according to Complainant, utilizes USAA as a "contractor," in light of the Supreme Court's March 2014 decision in *Lawson*.

A. Standard for Motion to Dismiss

1. Rule 12(b)(1)

Respondent asserts a jurisdictional challenge and claims it not subject to the whistleblower provisions of SOX.

Although 29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings, does not contain a section pertaining to such a motion to dismiss, 29 C.F.R. § 18.1(a) indicates that in situations not addressed in Part 18, the Federal Rules of Civil Procedure are applicable. In turn, Fed. R. Civ. P. 12(b)(1) addresses a motion to dismiss for lack of subject matter jurisdiction.

The ARB has discussed subject matter jurisdiction in SOX cases, notably in *Sylvester v. Parexel Int'l., LLC*, ARB Case No. 07-123, ALJ Case Nos. 2007-SOX-39 AND 2007-SOX-42, slip op. at 10-11 (ARB May 25, 2011):

> Subject matter jurisdiction "refers to a tribunal's power to hear a case." *Morrison v. Nat'l Australian Bank*, 130 S. Ct. 2869, 2877 (2010) (citing *Union Pacific v. Bhd. Of Locomotive Eng'rs*, 130 S .Ct. 584, 596-97 (2009)). Subject matter jurisdiction "presents an issue quite separate from the question whether the allegations the plaintiff makes entitles him to relief," *Morrison*, 130 S. Ct. at 2877, and thus under the whistleblower laws over which the Department of Labor has jurisdiction, should not be confused "with the wholly separate question whether [a complainant's] actions might be covered as 'protected activities.'" *Sasse v U.S. Dept. of Justice*, ARB No. 99-053, ALJ No. 1998- CAA-007, slip op. at 3 (ARB Aug. 31, 2000).
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> Similar to federal complaints based on federal question jurisdiction, the burden of establishing subject matter jurisdiction under Section 806 is not particularly onerous. *See, e.g., Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1317 (7th Cir. 1997); *Musson Theatrical*, 89 F.3d 1244, 1248 (6th Cir. 1996). As the Board explained in *Sasse*, the Department of Labor's subject matter jurisdiction is invoked "when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth in the paper writing invoking the court's action is not obviously frivolous." *Sasse*, slip op. at 3 (quoting *West Coast Exploration Co. v. McKay*, 213 F.2d 582, 591 (D.C. Cir.), *cert. denied*, 347 U.S. 989 (1954)).

2. Rule 12(b)(6)

Under Rule 12(b)(6), a pleading may be subject to dismissal for either of two reasons: "First, the law simply may not afford relief on the basis of the facts alleged in the complaint. … Second, regardless of whether the plaintiff is entitled to relief, the pleadings may be so badly framed that the plaintiff is not entitled to a trial on the merits." *Walker v. S. Cent. Bell Tel. Co.*, 904 F.2d 275, 277 (5th Cir. 1990). A complaint is deemed inadequate if it fails to "set forth sufficient information to outline the claim or permit inferences to be drawn that these elements exist." *Gen. Star Indem. Co. v. Vesta Fire Ins. Corp.*, 173 F.3d 946, 950 (5th Cir. 1999). "[C]onclusory allegations of legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Jones v. Alcoa, Inc.*, 339 F.3d 359, 362 (5th Cir. 2003) (quoting *Fernandez-Montez v. Allied Pilots Ass'n.*, 987 F.2d 278, 284 (5th Cir. 1993); *see also Jones v. Greninger*, 188 F.3d 322, 325 (5th Cir. 1999) ("Mere conclusory allegations of retaliation will not be enough to withstand a proper motion for dismissal of the claim.").

Unlike a motion for summary decision filed after discovery, a facial challenge offered to a complaint through Rule 12(b)(6) points to a missing essential element (no protected activity or adverse action) or a legal bar to the claim (e.g., sovereign immunity, lack of coverage over the respondent, the statute of limitations). *Evans v. U.S. Environmental Protection Agency*, ARB Case No. 08-059, ALJ Case No. 2008-CAA-3, slip op. at p. 10 (ARB July 31, 2012). A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the complaint, not the merits of the case. *Id*.

Also, "Rule 12 motions challenging the sufficiency of the pleadings are highly disfavored by the SOX regulations and highly impractical under the Office of Administrative Law Judge (OALJ) rules." *Sylvester*, ARB Case No. 07-123, slip op. at p. 13.

The court must address whether it has jurisdiction under Rule 12(b)(1) to hear Complainant's SOX whistleblower action, as well as whether Complainant has stated a claim upon which relief can be granted under Rule 12(b)(6).

B. Jurisdiction under SOX

Section 806 of SOX, codified at 18 U.S.C. § 1514A, creates a private cause of action for employees of publicly-traded companies who are retaliated against for engaging in certain protected activity. Section 1514A(a) states, in relevant part:

> (a) No 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)), 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, 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, 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, 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, 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. § 1514A(a).

A **company** means "any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) or any company 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." 29 C.F.R. § 1980.101(d).

A **covered person** means "any <u>company</u>, including any <u>subsidiary</u> or <u>affiliate</u> whose financial information is included in the consolidated financial statements of such company, … or any <u>officer</u>, <u>employee</u>, <u>contractor</u>, <u>subcontractor</u>, or agent <u>of such company</u>…." 29 C.F.R. § 1980.101(f).

An **employee** is means "an individual presently or formerly working for a covered person, an individual applying to work for a covered person, or an individual whose employment could be affected by a covered person." 29 C.F.R. § 1980.101(g).

Thus, the aggrieved employee's first responsibility is to show that SOX covered his employer.

C. Date of Adverse Action, Not Protected Activity Determines Jurisdiction

Respondent has stated that TrueCar was not a publicly-traded company in November 2012 when Complainant began his alleged protected activity among the reasons why his complaint should be dismissed.

Jurisdiction in SOX attaches from the date of the adverse personnel action, not from the date of the protected activity. *Gutierrez v. INB Financial Corp.*, 2014-SOX-16 (Order Granting Respondents' Motions to Dismiss and Cancelling Hearing) (ALJ May 12, 2014); *Gallagher v. Granada Entertainment USA*, slip op. at p. 1, 10, 2004-SOX-74 (ALJ Apr. 1, 2005)[4]; *Lerbs v. Buca de Beppo, Inc.*, 2004-SOX-8 (ALJ June 15, 2004). TrueCar became a publicly-traded company, and thus covered by SOX, on May 16, 2014.[5] Nonetheless, in connection to TrueCar, the only potential adverse actions where SOX jurisdiction attaches for Complainant if USAA is a "contractor" under SOX would be the placement on indefinite leave on May 22, 2014, 18 months after the beginning of Complainant's alleged protected activity in November 2012, and the termination on May 30, 2014.

D. "Contractor" under SOX

1. Supreme Court finds that employees of a "contractor" for a publicly-traded mutual fund company are covered by SOX's whistleblower protections in Lawson v. FMR LLC

The Supreme Court recently ruled on whether 18 U.S.C. § 1514A protected employees of certain privately held companies who act as a "contractor" to publicly-traded companies. *Lawson v. FMR LLC*, 134 S.Ct. 1158, 188 L.Ed. 2d 158; 2014 U.S. LEXIS 1783 (Mar. 4, 2014).

In *Lawson*, two former employees (Lawson and Zang) of private companies that contracted to advise or manage Fidelity mutual funds brought separate actions against their former employers, alleging the employers unlawfully retaliated against them in violation of § 1514A. *Lawson*, at 1161; *Gibney v. Evolution Marketing Research, LLC*, Case No. 14-1913, 25 F. Supp. 3d 74 (E.D. Pa. June 11, 2014). Lawson alleged that she was constructively discharged after raising concerns that certain cost accounting methodologies overstated the expenses associated with operating the mutual funds. *Lawson* at 1164; *Gibney* at 744-45. Zang alleged that he was fired in retaliation for raising concerns about inaccuracies in a draft for a registration statement to be filed with the Securities and Exchange Commission ("SEC"). *Id*. The defendant privately-held advisory and management firms contended that § 1514A was limited to protecting employees of a publicly-traded company from retaliation by the company's private contractors or subcontractors.

The Supreme Court rejected the defendant's contention based on the text of 18 U.S.C. § 1514A, legislative history of the statute, and environment in which SOX was enacted. The Supreme Court held that "based on the text of § 1514A, the mischief to which Congress was responding, and earlier legislation Congress drew upon, [§ 1514A] shelters employees of private

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[4] *Gallagher* involved periods where the employee's employer was not covered under SOX, and then was covered under SOX. The respondents included Granada and ITV, the parent company of Granada Ltd. and Carlton, Ltd., which were involved in a merger on February 2, 2004. *Gallagher*, 2004-SOX-74, slip op. at 4. The court separately analyzed jurisdiction over each adverse personnel action – the non-promotion claim on January 22, 2004, before the merger on February 2, 2004, and the termination on February 9, 2004, when the entities had merged and the respondents were now covered under SOX. *Gallagher*, slip op. at 10. Thus, the court determined that the non-promotion claim on January 22, 2004 was not actionable under SOX. *Id*. However, the termination occurring on February 9, 2004, after the merger and when the respondents became subject to SOX's statutory protection of the employee, was actionable. *Id*

[5] *TrueCar, Inc. (TRUE) IPO*, NASDAQ.com, *available at*: http://www.nasdaq.com/markets/ipos/company/truecar-inc-674160-75070 (last visited Mar. 16, 2015).

contractors and subcontractors [of publicly-traded companies], just as it shelters employees of the public company served by the contractors and subcontractors." *Lawson*, 134 S.Ct. at 1158; *Gibney* at p. 745. The Supreme Court noted that Congress borrowed § 1514A's retaliation provision from the wording of the 2000 Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121, and that § 42121 has itself been read to protect the employees of contractors covered by that provision.

In finding that the *Lawson* plaintiffs were covered by SOX, the Supreme Court relied on SOX's overarching goal of preventing fraud by public companies, as well as the unusual structure of mutual funds, which generally have no employees and are managed instead by independent investment advisers. Congress' concern about contractor conduct stemmed from Enron, where law firms, accountants, contractors and the like were ***complicit in***, if not integral to, the shareholder fraud and subsequent cover up Enron officers perpetrated. *Lawson*, 134 S.Ct. at 1169; *Gibney*, 25 F. Supp. 3d at 746. (emphasis as in original). Congress recognized that outside professionals bear significant responsibility for the public companies with whom they contract. *Id*. The Supreme Court also concluded that if the *Lawson* plaintiffs were not covered by SOX, it could insulate the entire mutual fund industry from 18 § 1514A, and given the vital role mutual funds play in filing reports to the SEC, such insulation could not have been Congress' intent. *Lawson*, 134 S.Ct. at 1171-72. Hence, finding the that *Lawson* plaintiffs were covered by SOX furthered the statute's goals in preventing publicly-held companies from utilizing outside contractors or related and controlled companies to perpetuate fraud on outside shareholders.

2. Interpretation of Lawson and whistleblowing by "contractor" employees in Gibney v. Evolution Marketing Research, LLC

Gibney v. Evolution Marketing Research, LLC, Case No. 14-1913, 25 F. Supp. 3d 74; 2014 U.S. Dist. LEXIS 79369; 2014 WL 2611213 (E.D.Pa. June 11, 2014), an early post-*Lawson* decision from the United States District Court for the Eastern District of Pennsylvania, is instructive in this matter. *Gibney* asks whether the coverage that the plaintiff assumes in the complaint – that SOX protects the employees of private companies who contend that their employer overbilled a public company – goes beyond that approved by *Lawson* or contemplated by the SOX statute. *Gibney*, 25 F. Supp. 3d at 747.

In *Gibney*, the plaintiff brought a SOX whistleblower action against his former employer, Evolution Marketing Research ("Evolution") for wrongful termination.[6] The plaintiff alleged that the defendant's planned billing practices relating to a publicly-traded client (to which the defendant – a non-publicly traded company – was a contractor) were fraudulent.

The plaintiff contended that as an employee of a contractor to a publicly-traded company, and pursuant to the Supreme Court's decision in *Lawson*, his activities were protected under 18 U.S.C. § 1514A. The court reviewed the *Lawson* decision and found that it was clear that

[6] See Sarbanes-Oxley Act (SOX) Whistleblower Digest: Burden of Proof and Production – Protected Activity, *available at*: http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/REFERENCE_WORKS/SOX_DIGEST_PROTECTED_ACTIVITY.HTM (last visited Mar. 9, 2015).

whistleblower protection extends to employees of private contractors or subcontractors for a public company. However, the *Gibney* court continued, the plaintiff was advocating "an impermissibly broad definition of SOX protection that was neither intended by Congress nor contemplated by the Supreme Court in *Lawson*." *Gibney*, 25 F. Supp. 3d at 747. First, the court noted that unlike *Lawson*, the instant case did not implicate the peculiar structure of the mutual fund industry, where there are no "employees." *Id.*; *Lawson*, 134 S.Ct. at 1171. Second, the complaint did not allege fraud *by* the publicly-traded company or that the defendant contractor abetted fraud *by* the publicly-traded company. Rather, the complaint alleged that there was fraud being committed *against* the publicly-traded company. Congress, the court noted, "was specifically concerned with preventing shareholder fraud either by the public company itself or *through* its contractors." *Gibney*, 25 F. Supp. 3d at 747 (emphasis as in original). The district court stated that it does not believe SOX was intended to reach the type of scenario in *Gibney*, "where there are allegations of fraudulent conduct between two companies who are a party to a contract, and one of those companies just happens to be publicly-traded." *Id*. Thus, the district court found that Evolution was not a covered respondent/defendant, and it granted Evolution's motion to dismiss.

D. Complainant Is Not a Covered Employee and USAA Is Not a Covered Respondent under SOX

I agree with Respondent regarding the Supreme Court's reading of "contractor" in *Lawson*, and that this reading does not make SOX applicable to Complainant. As stated by Justice Ginsburg in *Lawson*, "Congress enacted §1514A [SOX] aiming to encourage whistleblowing by contractor employees who suspect *fraud involving the public companies with whom they work*," and the SOX's purpose is to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." (emphasis added). (*Lawson*, 134 S.Ct. at 1170, 1172; Respondent's Resp., p. 3)). Also, Justice Ginsburg's chief concern in granting SOX coverage to the *Lawson* plaintiffs was the effect on potentially insulating the entire mutual fund industry from § 1514A, "and given the vital role mutual funds play in filing reports to the SEC," "such insulation could not have been Congress' intent." (*Id*. at 1171). Similar concerns about insulating an entire industry are not present in this matter.

I also agree with the Eastern District of Pennsylvania district court's emphasis on a narrow reading of contractor in *Gibney*, as opposed to "an impermissibly broad definition of SOX protection that was neither intended by Congress nor contemplated by the Supreme Court in *Lawson*. *Gibney*, 25 F. Supp. 3d at 747. Also, the district court continued,

> Nothing in the text of § 1514A or the *Lawson* decision suggests that SOX was intended to encompass every situation in which any party takes an action that has some attenuated, negative effect on the revenue of a publicly-traded company and, by extension decreases the value of a shareholder's investment.

Id. at 748. To extend SOX protection to a privately-held company such as Respondent based on these activities, which are two or three steps removed from potentially affecting a shareholder's investment, would turn SOX into a general fraud statute, which it is not.

Complainant focuses on the statements in the TrueCar's quarterly report (Form 10-Q) filed with the SEC for the period ending June 30, 2014 as support that USAA is a contractor of TrueCar. Specifically, Complainant cites the relationship between USAA and TrueCar regarding the amount of shares owned; how TrueCar operates USAA's Auto Buying Program; the "significant influence" USAA has on TrueCar because of the affinity group marketing partner relationship; that Victor Pasucci, USAA Assistant Vice President of Corporate Development, sat on the Board of Directors of TrueCar from June 2010 to May 2014; and that the "contract" between USAA and TrueCar has been extended to 2020. I am unpersuaded that these relationships, even if they cease to exist because of disgruntled members fleeing USAA due to the alleged misdeeds in the reimbursement of insurance premiums, as Complainant speculates, could somehow be tied to fraud against shareholders of TrueCar.

Further, Respondent offered an affidavit of Pasucci in which he explains the "operational marketing relationship" between the two entities. He also declares that "USAA provides no services to TrueCar, particularly no legal or financial adviser or management services to True Car, nor any services in relation to TrueCar's registration of securities under Section 12 of the Securities and Exchange Act of 1934 and/or TrueCar's requirement, if any, to file reports under Section 15(d) of the Act." Complainant's emphasis in reporting his concerns to USAA superiors reflected his concerns about state insurance law violations affecting USAA members, not the shareholders of TrueCar or any publicly-traded company with whom USAA has a business relationship.

Even prior to recent developments in the courts through *Lawson* and *Gibney*, the Administrative Review Board and administrative law judges have definitely stated that a non-publicly-traded company's commercial transactions with a publicly-traded company, similar to the "operational contractual relationship" between USAA and TrueCar, does not bring the non-publicly-traded company, and hence its employees, under the whistleblower provisions of SOX.

In *Fleszar v. American Medical Association*, 2007-SOX-30 (ALJ June 13, 2007), the ALJ rejected the complainant's contention that the respondent was covered under Section 806 of SOX because it had contractual relationships with publicly-traded companies and governmental entities, or due to real estate transactions or mutual fund activities. The ARB affirmed the ALJ's holding in *Fleszar v. American Medical Association*, ARB Nos. 07-091, 08-061, ALJ Nos., 2007-SOX-30, 2008-SOX-16 (ARB Mar. 31, 2009), adding that " a not-for-profit organization's engaging in commercial transactions does not convert it into a proper respondent for SOX whistleblower purposes." *Fleszar*, ARB Nos. 07-091, 08-061, slip op. at p. 4.

Roulett v. American Capital Access, 2004-SOX-78 (ALJ Dec. 22, 2004) is also instructive in this regard. In *Roulett*, the respondent provided insurance for registered companies in connection with debt securities of publicly-traded companies, and associated services. The complainant argued that the SOX whistleblower provision extended to the respondent because it is a "company representative" for publicly-traded companies. The ALJ found that the only merit to this argument was its creativity. The ALJ declined to expand [coverage under the whistleblower provision of the SOX] to a non-publicly traded company solely because it engages in financial business with publicly-traded companies. Further,

> [t]he fact that publicly-traded companies rely upon Respondent's services and purchase its products does not make Respondent their contractor, subcontractor, or agent. I acknowledge that Respondent's activities have the potential to [a]ffect the financial welfare of publicly-traded companies with which it does business. However, any product or service that a company purchases creates the potential for profit or loss for the company that purchases it. The Act provides specific requirements for its coverage, which I decline to expand to a non-publicly traded company solely because it engages in financial business with publicly-traded companies.

Roulett, slip op. at pp. 8-9.

III. ORDER

Based on the foregoing:

IT IS HEREBY ORDERED that Respondent's Request for Relief is **GRANTED** and this matter is **DISMISSED** for lack of jurisdiction (Fed. R. Civ. P. 12(b)(1) and/or failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)).

YOU ARE HEREBY NOTIFIED that a formal hearing on the merits of the above proceeding which was scheduled to commence at **9:00 a.m.** on **March 23,** in **San Antonio, Texas**, is **CANCELLED**.

SO ORDERED this 23rd day of March, 2015, at Covington, Louisiana.

Digitally signed by Clement Kennington
DN: CN=Clement Kennington,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Covington, S=LA, C=US
Location: Covington LA

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.109(e) and 1980.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).