



Issue Date: 22 November 2017

Case Nos.: 2016-SOX-00041

In the Matter of

JOHN T. GRIFFO
Complainant,

v.

BOOK DOG BOOKS, LLC,
ROBERT WILLIAM HOLDINGS, LLC,
ROBERT WILLIAM MANAGEMENT, LLC,
Respondents.

**ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION,
DISMISSING THE CLAIM AND CANCELING THE HEARING**

This proceeding arises from a complaint filed under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 ("SOX"), as amended, 18 U.S.C. § 1514A, and the implementing regulations at 29 C.F.R. Part 1980. SOX prohibits certain covered employers from discharging or otherwise discriminating against employees who provide information to a covered employer, a federal agency, or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C. §§ 1341 (mail fraud), 1342 (wire fraud), 1344 (bank fraud), 1348 (security fraud), and any rule or regulation of the Securities and Exchange Commission ("SEC"), or any provision of federal law relating to fraud against shareholders. Complainant alleges that Respondents terminated his employment in violation of SOX. For the reasons outlined below, I find that Complainant's complaint is not covered under SOX and must be dismissed.

I. PROCEDURAL HISTORY

Respondents terminated Complainant's employment as Chief Financial Officer on November 12, 2015. Complainant filed a complaint with OSHA on May 9, 2016, alleging Respondents terminated his employment in violation of SOX. Following an investigation, OSHA dismissed the complaint based on a finding that Respondent is not a "company" within the meaning of 18 U.S.C.A. § 1514A and, therefore, they are not subject to the SOX employee protection provisions. Complainant objected to OSHA's findings and requested a hearing.

Respondents filed a Motion for Summary Decision on September 20, 2017. On November 6, 2017, Complainant filed his Objection to Respondents' Motion for Summary Decision, after being granted additional time to respond. On November 6, 2017, Respondents requested leave to file a reply to Complainant's response. I have thoroughly reviewed all of the parties' arguments and evidence in making this ruling.

II. UNDISPUTED FACTS

Complainant worked for Respondent, Book Dog Books, as Chief Financial Officer ("CFO") between August 10, 2010 and November 12, 2015. (Complaint p. 1). Book Dog Books purchases, rents, and sells text books. (Complaint p. 1). Complainant's job duties included performing audits of Respondents' financials and book inventory.

Respondents are not publicly traded and Book Dog Books is a privately held company. (Complaint p. 1). Book Dog Books has a contract with Amazon to sell books. Book Dog Books has financial accounts with PNC bank. Both Amazon and PNC bank are publicly traded companies. Therefore, Book Dog Books has a contract with two publicly traded companies. Amazon and Book Dog Books also have a contract where Amazon has a warrant interest in the company and may purchase a percentage of Book Dog's shares at a predetermined rate. Amazon has not exercised this right to date.

Complainant worked solely for Book Dog Books. Complainant provided no services for Amazon or PNC bank. In November 2015, Complainant complained about inventory inconsistencies at Book Dog Books. Complainant alleges fraud on the part of Respondents. Complainant states that he contacted PNC Bank and another financial institution, Garrison, about the inventory inconsistencies. Complainant has alleged no fraud on the part of PNC Bank or Amazon. He also does not allege that he worked or provided services for PNC Bank or Amazon.

III. SUMMARY DECISION STANDARD

The standard for summary decision under the Rules of Practice and Procedure for administrative hearings is essentially the same as that contained in Federal Rule of Civil Procedure 56, the rule governing summary judgment in federal courts.¹ Summary decision is appropriate where "the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."² A material fact is one that might affect the outcome of the suit under the governing law, and a dispute about a material fact is genuine if the evidence is such that a reasonable factfinder could return a verdict for either party.³ The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact.⁴ Once the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts showing there is a

¹ *Saporito v. Cent. Locating Servs., Ltd.*, ARB No. 05-004, slip op. at 6 (Feb. 28, 2006) (CAA).

² 29 C.F.R. § 18.40(d); *Celotex Corp. v. Cartrett*, 477 U.S. 317, 322 (1986).

³ *Saporito*, ARB No. 05-004, slip op. at 5 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

⁴ *Celotex*, 477 U.S. at 323.

genuine issue for trial.⁵ The party opposing the motion “may not rest on the mere allegations or denials of [the] pleadings. Such response must set forth specific facts showing there is a genuine issue of fact for the hearing.”⁶ In deciding on the motion, I must view the evidence in the light most favorable to the non-moving party.⁷

IV. DISCUSSION

a. Respondents are not covered entities under SOX

Respondents assert that SOX does not apply to them since Book Dog Books is not a publicly traded company. I will address whether Section 806 of SOX applies to this matter.

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) *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. 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--

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(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

⁵ *Anderson*, 477 U.S. at 250.

⁶ 29 C.F.R. § 18.40(c).

⁷ *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, slip op. at 2 (Aug. 23, 2003) (STA).

(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.⁸

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. 78l) or any company 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.”⁹

A **covered person** means “any **company**, including any **subsidiary** or **affiliate** whose financial information is included in the consolidated financial statements of such company, ... or any officer, employee, contractor, subcontractor, or agent of such company....”¹⁰

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.”¹¹

Therefore, to prevail on the merits of a Section 806 case, a covered employee must prove by a preponderance of the evidence that he or she, suffered an unfavorable personnel action by a covered employer.¹² Therefore, as a threshold matter, to avail himself of SOX whistleblower protections, Complainant must demonstrate that Respondents are covered under Section 806, i.e., a company “with a class of securities registered” under the Securities Exchange Act, or that is “required to file reports” under the Act, or that the company is a subcontractor, contractor, or agent of a publicly traded company.¹³

It is undisputed that Respondent, Book Dog Books, is not a publicly traded company, has no class of securities registered under section 12, and it is not required to file reports under Section 15(d) of the Securities Exchange Act of 1934. Instead, Complainant asserts liability based on Respondent’s contract with Amazon to sell, purchase, and rent books. Complainant relies on the Supreme Court decision in *Lawson v. FMR, LLC*, where the Court ruled on whether 18 U.S.C. § 1514A protected employees of certain privately held companies who act as a “contractor” to publicly traded companies.¹⁴

⁸ 18 U.S.C. § 1514A(a).

⁹ 29 C.F.R. § 1980.101(d).

¹⁰ 29 C.F.R. § 1980.101(f)(emphasis added).

¹¹ 29 C.F.R. § 1980.101(g).

¹² 49 U.S.C.A. § 42121; 18 U.S.C.A § 1514A(b)(2)(C).

¹³ 18 U.S.C.A. § 1514A(a).

¹⁴ *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 Section 1514A.¹⁵ Lawson alleged that she was constructively discharged after raising concerns that certain cost accounting methodologies overstated the expenses associated with operating the mutual funds.¹⁶ 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”).¹⁷ The defendant privately-held advisory and management firms contended that Section 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 contractors and subcontractors [of publicly-traded companies], just as it shelters employees of the public company served by the contractors and subcontractors.”¹⁸ The Supreme Court noted that Congress borrowed Section 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 Section 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.¹⁹ Congress recognized that outside professionals bear significant responsibility for the public companies with whom they contract.²⁰ The Supreme Court also concluded that if the *Lawson* plaintiffs were not covered by SOX, it could insulate the entire mutual fund industry from Section 1514A, and given the vital role mutual funds play in filing reports to the SEC, such insulation could not have been Congress’ intent.²¹ Hence, finding that the *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.

¹⁵ *Lawson*, at 1161; *Gibney v. Evolution Marketing Research, LLC*, Case No. 14-1913, 25 F. Supp. 3d 74 (E.D. Pa. June 11, 2014).

¹⁶ *Lawson* at 1164; *Gibney* at 744-45.

¹⁷ *Id.*

¹⁸ *Lawson*, 134 S.Ct. at 1158; *Gibney* at p. 745.

¹⁹ *Lawson*, 134 S.Ct. at 1169; *Gibney*, 25 F. Supp. 3d at 746. (emphasis as in original).

²⁰ *Id.*

²¹ *Lawson*, 134 S.Ct. at 1171-72.

Complainant also relies on *Spinner v. David Landau & Associates, LLC*, ARB Nos. 10-111, 10-115; ALJ No. 2010-SOX-029 (ARB May 31, 2012). In *Spinner*, however, the Board held 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.”²² The Board reasoned that:

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 mostly 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.²³

Complainant asserts that SOX should apply to Respondent Book Dog Books the same as it did in *Lawson* and *Spinner*. I disagree. The fact patterns are vastly different. First, the unique nature of the mutual fund and accounting industry is what extended protection to the employees in *Lawson* and *Spinner*, who worked directly with the publicly traded companies. In both cases, the complainants worked directly with the publicly traded company and were in a direct position to uncover fraud and protect the shareholders. They also uncovered fraud on the part of the publicly traded company. The same attributes are not established in this case. Complainant provided no services to Amazon and was in no position to uncover fraud against Amazon’s shareholders.

Neither the Supreme Court’s interpretation of a “contractor” in *Lawson* nor the Board’s interpretation in *Spinner*, makes 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.”²⁴ Similar concerns about insulating an entire industry are not present in this matter. I agree with the more narrow interpretation of Act as found by the Eastern District of Pennsylvania’s interpretation of the term 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*.”²⁵

²² *Spinner v. David Landau & Associates, LLC*, ARB Nos. 10-111, 10-115 at 16; ALJ No. 2010-SOX-029 (ARB May 31, 2012)

²³ *Id.* at 13.

²⁴ (*Id.* at 1171).

²⁵ *Gibney v. Evolution Marketing Research, LLC*, Case No. 14-1913, 25 F. Supp. 3d 74, 747; 2014 U.S. Dist. LEXIS 79369; 2014 WL 2611213 (E.D.Pa. June 11, 2014),

In *Gibney*, the plaintiff brought a SOX whistleblower action against his former employer, Evolution Marketing Research (“Evolution”) for wrongful termination. The complainant alleged that the respondent’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 whistleblower protection extends to some employees of private contractors or subcontractors for a public company. However, the *Gibney* court continued, the complainant was advocating “an impermissibly broad definition of SOX protection that was neither intended by Congress nor contemplated by the Supreme Court in *Lawson*.”²⁶ 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.”²⁷ 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.”²⁸ 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.”²⁹ Thus, the district court found that Evolution was not a covered respondent, and it granted Evolution’s motion to dismiss.

Also the court in *Gibney*, further found, that “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.”³⁰ I agree with the Court in *Gibney*. 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.

Accordingly, I find that the facts do not support a finding that Respondents are covered under the Act. Even if Complainant participated in protected activity and Respondent terminated his employment based on this activity, Respondents have credibly demonstrated that they are not publicly traded and, while Book Dog Books has a contract with Amazon, Complainant provided no services to Amazon or to PNC bank. Complainant has failed to show a genuine dispute on this point, and therefore, Respondents are entitled to summary decision as a matter of law.

²⁶ *Gibney*, 25 F. Supp. 3d at 747.

²⁷ *Id.*; *Lawson*, 134 S.Ct. at 1171.

²⁸ *Gibney*, 25 F. Supp. 3d at 747 (emphasis as in original).

²⁹ *Id.*

³⁰ *Id.* at 748.

V. ORDER

For the reasons outlined above, Respondents' Motion for Summary Decision is **GRANTED**. This matter is **DISMISSED** and the hearing in this matter is **CANCELED**.

JOSEPH E. KANE
Administrative Law Judge