



Issue Date: 30 January 2019

CASE NO.: 2018-SOX-00039

In the Matter of:

ANNETTE MARSHALL,
Complainant,

v.

HERNDON CAPITAL MANAGEMENT, LCC,
Respondent,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

**DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
COMPLAINANT'S CLAIM**

This matter arises under the employee protection provisions of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A and the implementing regulations at 29 C.F.R. Part 1980. Pursuant to 29 C.F.R. §1980.107, the proceeding will be held in a manner consistent with the procedural rules set forth in federal regulations at 29 C.F.R. Part 18, Subpart A (29 C.F.R. §18.10 to §18.95).

Annette M. Marshall ("Complainant") is a former employee of Herndon Capital Management, LCC ("Respondent"). Complainant contends that she was terminated as part of a reduction in force after raising legal concerns that Respondent was allowing the Board of Directors of the parent company, Atlanta Life Investment Advisors ("ALIA"), immediate and full administrative access to Respondent's e-mail server and Client Relationship Management ("CRM") system.

Complainant filed a claim under SOX, which was docketed in the Office of Administrative Law Judges on September 3, 2017. This matter was initially assigned to Administrative Law Judge Dana Rosen, and subsequently reassigned to the undersigned on November 13, 2018. On November 7, 2018, Respondent filed a Motion to Dismiss

Complainant's Complaint or in the Alternative a Motion for Summary Decision.¹ Complainant timely responded to the motion. Judge Rosen granted Respondent's motion for leave to file a reply brief, and Respondent filed a response on November 28, 2018. In deciding this matter, I have fully read and considered Respondent's motion and attached exhibits, and Complainant's response. For the reasons set forth below, I conclude there is no standing in the present matter and Complainant's claim is dismissed.

Positions of the Parties

Respondent's Position

Respondent argues that neither the Respondent or its parent company are "covered employers" within the meaning of SOX because they are privately-held and do not have a class of securities registered under Section 12 of the Securities Exchange Act of 1934 ("SEC"). Respondent contends that Complainant has misinterpreted the Supreme Court's decision in *Lawson v. FMR LLC*, 571 U.S. 429 (2014), in support of her argument that she is a covered employee under SOX. Respondent argues that while *Lawson* can extend to all employees of privately-held companies that contract with publicly-held companies or mutual funds that it does not apply in this case, specifically, "in the absence of any complaint(s) of unlawful activity related to the publicly-held company or mutual fund with which the privately-held employer contracts." Respondent argues that Complainant has not alleged that she complained of any unlawful activity by a publicly-traded company or mutual fund with whom Respondent contracted with, therefore, *Lawson* does not provide support for Complainant's contention that she is a covered employee under SOX.²

Complainant's Position

Complainant argues that she is a covered employee under SOX regulations in light of the Supreme Court's decision in *Lawson*. Complainant contends the Supreme Court ruled that SOX provides whistleblower protections to employees of public companies but also protects private contractors and subcontractors of public companies. Complainant contends while Respondent is not a public company that Respondent contracts with mutual funds which are public and do not have employees, and that she ultimately "opposed practices that would have exposed private trading information related to the publicly traded mutual funds;" therefore, under *Lawson*, both her and the Respondent are covered under SOX Section 806 and § 1514A.

Discussion

To safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation, Congress enacted the Sarbanes-Oxley Act of 2002." *Lawson v. FMR LLC*, 571 U.S. 429, 432 (2014). Section 806 of SOX "protects employees who provide information, which the employee 'reasonably believes constitutes a violation' of

¹ Respondent contends it had previously filed the Motion on October 5, 2018; however, the initial motion was not received by the Office of Administrative Law Judge's office.

² As I find that there is reason to dismiss Complainant's claim, I will not address Respondent's or Complainant's arguments for or against a summary decision.

any SEC rule or regulation or ‘Federal law relating to fraud against shareholders.’” *Fraser v. Fiduciary Tr. Co. Int’l*, 417 F. Supp. 2d 310, 322 (S.D.N.Y. 2006) (citing 18 U.S.C. § 1514A(a)(1)). To state a claim arising under SOX’s whistleblower provision, a plaintiff must allege that “(1) he engaged in protected activity; (2) the employer knew of the protected activity; (3) he suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action.” *O’Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506, 510 (S.D.N.Y. 2008) (quoting *Fraser*, 417 F. Supp. 2d at 322). To qualify as a covered employer subject to suit under SOX, a company must either: (i) have “a class of securities registered under section 12 of the Securities Exchange Act of 1934”; (ii) be “required to file reports under section 15(d) of the Securities Exchange Act of 1934 ... including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company”; (iii) be a “nationally recognized statistical rating organization”; or (iv) be an “officer, employee, contractor, subcontractor, or agent of [a publicly traded company] or nationally recognized statistical rating organization.” 18 U.S.C. § 1514A; see also *Tellez v. OTG Interactive, LLC*, No. 15 CV 8984-LTS, 2016 WL 5376214, at *2 (S.D.N.Y. Sept. 26, 2016).

In moving to dismiss the current claim, Respondent contends Complainant is not a protected person under SOX, and therefore, her internal complaints of Respondent’s disclosure of its e-mails and CRM system is not considered protected activity under § 1514A. For reasons listed below, I agree with the Respondent.

A thorough and comprehensive examination of the Supreme Court’s decision in *Lawson v. FRM LLC* was described in *Baskett v. Autonomous Research LLP*, 2018 WL 4757962, at *7-8 (S.D. N.Y. Sept. 28, 2018):

In *Lawson v. FMR LLC*, the Supreme Court addressed the application of SOX’s “contractor, subcontractor or agent” language. 571 U.S. 429. In that case, two former employees brought lawsuits alleging unlawful retaliation against their private company employers that provided investment advising services to a family of mutual funds. *Id.* at 433. The mutual funds were public companies, had no employees, and had contracted with defendants to provide advisory services. *Id.* The plaintiffs’ suit stemmed from allegations of fraud relating directly to the mutual funds. *Id.* In finding that SOX’s whistleblower protection extended to the plaintiffs, the Supreme Court analyzed SOX’s “contractor” provision. *Id.* That analysis is instructive here.

In reaching its decision, the Supreme Court emphasized SOX’s overarching goal of preventing future fraud by public companies, as well as the unusual structure of mutual funds (which generally have no employees). In particular, the Supreme Court noted:

In the Enron scandal that prompted [SOX], contractors and subcontractors ... participated in Enron’s fraud and its coverup. When employees of those contractors attempted to bring misconduct to light, they encountered retaliation by their

employers. [SOX thus] contains numerous provisions aimed at controlling the conduct of accountants, auditors, and lawyers who work with public companies.

Id. at 434. The Supreme Court found that given Congress' clear “concern about contractor conduct of the kind that contributed to Enron’s collapse,” it “regard[ed] with suspicion construction of § 1514A to protect whistleblowers only when they are employed by a public company, and not when they work for the public company’s contractor.” *Id.* Therefore, the Supreme Court held that finding the *Lawson* plaintiffs to be covered under SOX furthered the statute’s goal of preventing publicly-held companies from utilizing outside contractors to perpetuate fraud on shareholders.

Since *Lawson*, federal courts that have addressed the scope of § 806’s “contractor” provision have found that it does not cover situations where the plaintiff employee does not allege fraud related to or engaged in by a public company. In other words, the contractor provision does not apply where a public company has no involvement in the conduct Congress sought to curtail by passing SOX. For instance, in *Gibney v. Evolution Marketing Research, LLC*, an employee sued his former employer, a private contractor of a public company, after the employer allegedly fired him for complaining that the employer was overbilling a publicly traded company for which it provided marketing services. 25 F. Supp. 3d 741, 742 (E.D. Pa. 2014). The court held that the allegations failed to state a claim, concluding that plaintiff was “advocat[ing] for an impermissibly broad definition of SOX protection that was neither intended by Congress nor contemplated by the Supreme Court in *Lawson*.” *Id.* at 747 (noting that the case “does not implicate the peculiar structure of the mutual fund industry” and that denying plaintiff coverage would not “ ‘insulate’ an entire industry from § 1514A protection”). In particular, the court found that “[n]othing 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 747–48 (“Plaintiff has not alleged that he blew the whistle on fraud committed by Merck (either acting on its own or acting through contractors like [defendant]). Rather, [p]laintiff is alleging that [defendant] committed fraud against Merck. Thus, based on Plaintiff’s allegations, Merck is the victim of fraud rather than its perpetrator.”). Numerous other courts have reached similar conclusions. *See, e.g., Brown v. Colonial Sav. F.A.*, No. 4:16-CV-884-A, 2017 WL 1080937, at *4 (N.D. Tex. Mar. 21, 2017) (relying on *Lawson* and *Gibney* and concluding that “Plaintiff’s allegations of fraud are too far removed from potentially harming the shareholders of a public company to be covered under § 1514A”); *Reyher v. Grant Thornton, LLP*, 262 F. Supp. 3d 209, 217 (E.D. Pa. 2017) (dismissing SOX claim, finding that the “purported whistleblower employed by a private company cannot invoke the protections of section 1514A simply because her

employer happens to contract with public companies on matters unrelated to the alleged whistleblowing”); *Anthony v. Nw. Mut. Life Ins. Co.*, 130 F. Supp. 3d 644, 652 (N.D.N.Y. 2015) (finding that “§ 1514A only covers contractors insofar as they are firsthand witnesses to corporate fraud at a public company”).

In the current case, Complainant’s actions do not relate to retaliation based on her reports of alleged fraud relating to or engaged in by a public company. Complainant argues that she opposed practices that would have exposed private trading information relating to publicly traded mutual funds, therefore, she is covered under SOX § 1514A. However, Complainant raised concerns of the potentially unlawful activity of disclosure of Respondent’s confidential e-mails and information. Complainant’s concerns were on the Respondent rather than potential fraud committed by a public company or on its shareholders.

Complainant failed to demonstrate that she made complaints relating to fraud committed by a public company or complaints relating to a fraud that affects a public company’s shareholders. Therefore, under SOX and *Lawson v. FMR LLC*, Complainant is not a protected person, and her SOX claims against Respondent must be dismissed.

ORDER

Accordingly, IT IS ORDERED that the complaint of Complainant Annette M. Marshall is **DISMISSED**, and the Secretary’s Findings are the final order of the Secretary.

SO ORDERED.

LORANZO M. FLEMING
Administrative Law Judge

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