

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 04 March 2020

CASE NO.: 2019-SOX-00042

In the Matter of:

LUCILLE BROWER,
Complainant,

v.

CARDWORKS, INC.,
Respondent.

ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DECISION

This matter arises from a complaint of discrimination filed by Lucille Brower (“Complainant” or “Brower”) against CardWorks, Inc. (“Respondent” or “CardWorks”), under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (“SOX” or “the Act”) and the procedural regulations found at 29 C.F.R. Part 1980.

I. BACKGROUND

This claim was filed on February 21, 2019, with the Organization Health and Safety Administration (“OSHA”). Compl. at 1. OSHA dismissed the complaint on May 14, 2019, and Brower sought review by the Office of Administrative Law Judges. This court issued a Notice of Hearing on July 17, 2019, setting a hearing for January 31, 2020. Following a motion from Brower, the hearing was continued to April 2, 2020.

On November 12, 2019, CardWorks filed a Motion for Summary Decision arguing that there is no jurisdiction for the case under SOX because CardWorks is a privately held corporation, and there is no exception that can be used to create SOX jurisdiction in this case. In support of its position, CardWorks attached an affidavit from Donald M. Berman (“Berman Aff.”), the Chair and Chief Executive Officer of CardWorks and of its holding company, Cardholder Management Services, Inc. (“CMSI”). The affidavit primarily lays out the relevant corporate structure and ownership of CardWorks, Berman Aff. ¶¶ 2-17, as well as the general job responsibilities of Brower within CardWorks. *Id.* ¶¶ 18-23. Brower filed an opposition to the Motion, alleging that jurisdiction can be found either through the chain of corporate ownership

of CardWorks, or through a contracting relationship with covered companies under the theory espoused in the Supreme Court's decision in *Lawson v. FMR*, 571 U.S. 429 (2014).

The Court held a conference call on February 11, 2020, to hear argument on the motion. After reviewing the positions of the Parties, reading the relevant case law and hearing argument, the Court agrees with CardWorks's position, will grant the Motion for Summary Decision and will dismiss this case for lack of jurisdiction.

II. DISCUSSION

The Court shall grant summary decision if the moving party shows that there is no genuine issue of material fact and that it is entitled to a decision as a matter of law. 29 C.F.R. § 18.72(a). The Motion for Summary Decision in this case is based on the premise that there is no jurisdiction to bring this case because CardWorks is not a covered entity under the SOX whistleblower statute.

Under 18 U.S.C. § 1514A, SOX protects against certain actions taken against whistleblowers made by a

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.

18 U.S.C. § 1514A. Cardworks argues that it is not such a company, as it is a privately held corporation, and does not meet any of the statutory criteria. Berman Aff. at ¶¶ 2-5. While Brower does not explicitly concede that CardWorks, standing alone, is not a covered entity under SOX, neither does she give any evidence to suggest that CardWorks, standing alone, would be directly covered because it has 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. So, even in the light most favorable to Brower, CardWorks, standing alone, is not a covered entity. She must find another avenue by which to show that jurisdiction vests.

To this end, Brower offers two alternative theories. First, Brower argues that, moving up the corporate ownership chain from CardWorks, one eventually reaches Allianz SE, which she claims has publicly traded shares in the United States and, therefore, triggers jurisdiction down the chain to CardWorks. Second, Brower argues that, under the Supreme Court case of *Lawson v. FMR*, 571 U.S. 429 (2014), because certain clients of CardWorks are publicly traded companies, CardWorks can be pulled under the jurisdiction of SOX based on that relationship, even if CardWorks itself is a privately held company. The court will address each theory in turn.

A. Corporate Ownership Theory

Brower's first argument is that jurisdiction vests in this case based on the ultimate ownership interest in CardWorks by a SOX-covered company. The facts, however, do not bear this out. In the Affidavit of Donald Berman, the Chair and CEO of CardWorks, he notes that CardWorks is owned 100% by CMSI, which is a privately-held, top-level holding company. Berman Aff. ¶ 7. He also notes that the subsidiaries of CardWorks—Merrick Bank and CardWorks Servicing (CWS)—are privately held as well. Berman Aff. ¶¶ 6, 17. Brower was employed by CWS or CardWorks from 1999 until her termination on September 13, 2018. Berman Aff. ¶¶ 18-19.

Berman goes on to state that, in 2017, three privately-held companies—B2 FIE VIII LLC (“B2 FIE”), PCP CW Aggregator Holdings LP and Reverence Card Co-Invest LP—purchased minority stakes in CMSI. Berman Aff. ¶ 10. B2 FIE, a privately-held company, is a wholly owned subsidiary of PIMCO BRAVO 2 (“BRAVO 2”), another privately-held company. Berman Aff. ¶¶ 11-12. Brower does not contest any of this portion of the corporate structure, and, none of the structure here recited, all being privately-owned, could conceivably trigger jurisdiction under SOX under an ownership theory, even if the court were willing to look above CMSI as a top-level company.

The jump that Brower next attempts to make is through Pacific Investment Management Company (“PIMCO”) to its ultimate parent company, Allianz SE (“Allianz”). The first question is whether there is an ownership interest anywhere in CardWorks's ownership chain by PIMCO.¹ Berman is unequivocal that there is not. Berman Aff. at ¶13. Brower counters by citing an August 1, 2017, press release, which is quoted in her own affidavit. Brower Aff. ¶ 5. The press release notes that CardWorks welcomed three non-controlling minority shareholders, including PIMCO. The question of PIMCO's ownership interest in CardWorks thus appears to be in dispute, but this does not matter to the outcome of the case, as PIMCO is also privately-held, Berman Aff. ¶ 14, a fact which Brower does not contest. So, taken in the light most favorable to Brower, jurisdiction under SOX has still not been established.

Thus, Brower reaches her final candidate through which she attempts to derive jurisdiction: PIMCO's parent company, Allianz SE, claiming that it is subject to SOX and by implication, so is everything below it in the chain. CardWorks notes, however, that Allianz does not have any securities listed on a U.S. National Exchange, and is therefore not subject to SOX. Berman Aff. ¶ 15. Brower argues past this point, saying that Allianz is listed on the OTC Pink Sheets. Brower Aff. ¶ 4. However, mere listing on the Pink Sheets is not sufficient to trigger SOX jurisdiction. As quoted above, a company only falls under SOX jurisdiction if it has “a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C.

¹ CardWorks admits that PIMCO serves as the investment manager or adviser for some mutual funds that are listed on a national exchange, Berman Aff. ¶ 14, but Brower does not claim that the investment manager relationship between the two triggers jurisdiction in this case under a *Lawson*-type contractor theory (see Section 2, *infra*), so the court will not address it.

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))” 18 U.S.C. § 1514A(a).

According to the SEC, “Companies on OTC Markets Group’s Pink market are not required to meet any minimum standard. *Many of these companies do not file periodic reports or audited financial statements with the SEC*, making it very difficult for investors to find current, reliable information about those companies.” *See Over-the-Counter Market*, Securities and Exchange Commission, at <https://www.sec.gov/divisions/marketreg/mrotc.shtml> (emphasis added). As Professor William Carney points out, “Brokers and dealers can continue to trade a stock in the Pink Sheets . . . Trading in this market can occur if the issuer furnishes . . . information comparable to that required by ‘34 Act reporting, except there are no requirements that financial statements be audited and *there is no SEC filing or review. Companies traded in this manner are not subject to the requirements of SOX.*” William J. Carney, *The Costs of Being Public After Sarbanes-Oxley: The Irony of “Going Private”*, 55 Emory L.J. 141, 143 (2006). Given that trading in the OTC Pink Sheets is not a definitive indication of SEC registration or reporting—and when not registering with or reporting to the SEC is frequently a characteristic of companies trading stock in this market—the Court would expect Complainant to provide some evidence of the required SEC oversight in its response to the Motion for Summary Decision, but it has provided none.

To the contrary, a cursory search of public SEC filings, of which the court takes administrative notice, shows that Allianz withdrew itself from SEC filing requirements in 2009:

Item 7: Notice Requirement

A. Allianz published a notice, as required by Rule 12h-6(h) under the Exchange Act, disclosing its intent to terminate its duty to file reports under section 13(a) and section 15(d) of the Exchange Act on September 22, 2009.

B. The notice was disseminated in the United States via wire services including Bloomberg and Reuters. In addition, Allianz submitted a copy of the notice to the Securities and Exchange Commission under cover of a Form 6-K on September 22, 2009.

See Allianz SE, Form 15-F, Oct. 30, 2009, at <https://www.sec.gov/Archives/edgar/data/1127508/000119312509218869/d15f12b.htm>. So, in short, even in the light most favorable to Brower—that Allianz SE is the ultimate holding company of CardWorks—she has not shown that Allianz SE is itself subject to SOX, and therefore, liability cannot trickle down to CardWorks in this manner in this case.²

² During the pendency of this motion, Brower submitted a letter to the Court with an attached February 18, 2020, press release stating that CardWorks has signed an agreement to be acquired by Ally Financial Inc. Comp’s Letter to the Court, Feb 21, 2020, attachment. CardWorks responded by letter on February 27, 2020. Brower does not show or argue how this alleged pending transaction creates SOX jurisdiction in this case. Even if, *arguendo*, this transaction somehow subjected CMSI and/or CardWorks to SOX, Brower has also neither shown, nor argued, how

B. Contractor Theory Under Lawson v. FMR LLC

Brower next argues that under the Supreme Court’s *Lawson* decision, privately-held companies such as CardWorks can be considered subject to SOX whistleblower claims through a contracting relationship with a covered company. 571 U.S. 429. While the premise—that employees of a private company contracted by a publicly-owned company can be afforded SOX whistleblower protection under certain circumstances—was addressed by the *Lawson* court, that is not what the facts, as alleged by Brower, show here.

In *Lawson*, the Supreme Court addressed the application of SOX’s “contractor, subcontractor or agent” language. There, two former employees alleged unlawful retaliation by their private employers, which provided investment advising services to a family of mutual funds. *Id.* at 433. The mutual funds themselves were public companies, but had no employees; they contracted with the defendants in *Lawson* to provide advisory services. *Id.* The plaintiffs’ suit stemmed from allegations of fraud relating directly to the mutual funds. *Id.* The *Lawson* Court found that SOX’s whistleblower protection extended to the plaintiffs, and their analysis is instructive.

In reaching its decision, the Supreme Court emphasized SOX’s overarching goal of preventing future fraud by public companies. In particular, the 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’s concern about the type of conduct that contributed to Enron’s collapse, it could not endorse a 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.* As a result, the Court held finding SOX jurisdiction in *Lawson* furthered the statute’s goal of preventing publicly-held companies from utilizing outside contractors to defraud shareholders. In short, “the specific shareholder fraud contemplated by SOX is that in which a public company—either acting on its own or acting through its contractors—makes material misrepresentations about its financial picture in order to deceive its shareholders.” *Id.* at 748.

the acquisition of the company after-the-fact would trigger jurisdiction for actions that occurred, according to the Complaint, 2-3 years prior to the acquisition. Therefore, the submission of this letter does not change the reasoning of the court.

Since *Lawson*, federal courts that have addressed the scope of Section 806's contractor provision have found that it does not cover situations where, as in the present case, 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*, the court dismissed a SOX claim when the complainant alleged retaliation by his private employer. 25 F. Supp. 3d 741, 742 (E.D. Pa. 2014). In that case, the complainant claimed he had been fired for complaining that his private employer was overbilling a publicly traded company that it had contracted with. *Id.* at 742. Citing *Lawson*, the Court noted that the complainant had not alleged fraud by the publicly-traded company, nor alleged that the publicly-traded company was committing fraud through the contract with the private employer. *Id.* at 747-48. The court noted 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. And in this case, the publicly-traded company was the victim, not the perpetrator of the fraud. *Id.*

Other courts have followed suit. In *Brown v. Colonial Savings FA*, the court emphasized that SOX is not a “general anti-retaliation statute”. No. 4:16-CV-884-A, 2017 WL 1080937, at *4 (N.D. Tex. Mar. 21, 2017) (citing *Safarian v. Am. DG Energy*, No. 10-6082, 2014 WL 1744989 at *5 (D.N.J. Apr. 29, 2014)). Relying on *Lawson* and *Gibney*, the *Brown* court concluded that a plaintiff's allegations of fraud against her private employer were too far removed from potentially harming the shareholders of a public company to be covered under § 1514A. In *Reyher v. Grant Thornton, LLP*, 262 F. Supp. 3d 209, 217 (E.D. Pa. 2017) the court dismissed a 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.”

In *Anthony v. Northwest Mutual Life Insurance*, the court found that “§ 1514A only covers contractors insofar as they are firsthand witnesses to corporate fraud at a public company”. 130 F. Supp. 3d 644, 652 (N.D.N.Y. 2015). And in *Baskett v. Autonomous Research LLP*, the court dismissed a claim involving a private company's internal workings rather than fraud committed by a public company or on its shareholders. No. 17-CV-9237 (VSB), 2018 WL 4757962, at *7-8 (S.D.N.Y. Sept. 28, 2018). Citing *Anthony*, the *Baskett* court held that the “effect of [SOX's] limitations is to restrict § 1514A to situations where a contractor employee is functionally acting as an employee of a public company, and in that capacity, is a witness to fraud by the public company.” *Id.* (citing 130 F. Supp. 3d at 652.)

In the present case, in the light most favorable to Brower, her own description of her claim falls short of triggering SOX jurisdiction. “Ms. Brower has acted in a whistleblower capacity as she has complained to upper management concerning financial irregularities and a *failure to conduct proper audit activities at CWI.*” Compl. at 6 (emphasis added). Brower claims

she was retaliated against for (1) reporting to the FDIC and the Board that a certain *senior official in CWI* had asked for a deferment in a compliance examination; (2) requesting access to certain documents and personnel to perform her job; and (3) reporting to board members the financial and audit *irregularities found by FDIC and E&Y in CWI's financial statements*. Compl. at 7 (emphasis added). All of the allegations of misconduct and fraud were actions within CardWorks. In no way or form has Brower alleged that she reported fraud carried out by Ernst & Young, or by any other publicly-held entity, or that there was somehow fraud being perpetrated through the relationship between Ernst & Young (or any other publicly traded company) and CardWorks.

Brower lists a number of clients of CardWorks that are publicly-traded companies, Compl. Brf. at 5, but merely having a relationship with a publicly-traded company is not sufficient to trigger jurisdiction. None of the whistleblower actions are related to fraud within those companies, or allege fraud by CardWorks on behalf of those companies. The complainant is simply not in a position to be a “firsthand witness[] to [the shareholder] fraud’ Congress anticipated § 1514A would protect.” *Lawson*, 571 U.S. at 454 (quoting S. Rep. No. 107-146 at 10).

In short, Brower has not alleged anything that has triggered jurisdiction under SOX and the case must, therefore, be dismissed. Because the court finds no jurisdiction, it does not reach CardWorks’s third argument: that Brower’s Complaint fails to allege protected activity.

ORDER

Accordingly, the following **ORDER** is hereby entered:

The Motion for Summary Decision is **GRANTED**, the scheduled hearing is **CANCELLED** and the Complaint is **DISMISSED** for lack of jurisdiction.

SO ORDERED.

JERRY R. DeMAIO
Administrative Law Judge

Boston, Massachusetts