The whistleblower protection provision of SOX prohibits an “officer, employee, contractor, subcontractor or agency” of a publicly-traded company from retaliating against “an employee” for disclosing reasonably perceived potential or actual violations of SEC rules or the other anti-fraud provisions enumerated in Section 806. In March 2014, the Supreme Court held in Lawson v. FMR that employees of contractors of public companies, including the attorneys and accountants who prepare the SEC filings of public companies, are covered under Section 806. But the Court also warned that “limiting principles may serve as check against overbroad applications” of SOX.

Though SOX may not be a general anti-retaliation statute, limits on its application should be drawn from the statutory text and Congress’ intent. However, a recent decision by Judge Kahn of the Northern District of NY in Anthony v. Northwestern Mutual Life Insurance Co., demarcated an overbroad limitation on the scope of coverage – holding that SOX does not protect employees of contractors whose disclosures concern only the contractor’s violations of federal securities laws. In other words, “[a] private company’s fraudulent practices do not become subject to § 1514A merely because that company incidentally has a contract with a public company.”

Anthony worked at Tronco Financial, a contractor for Northwestern Mutual Funds, and raised concerns to Tronco management regarding conduct of Tronco Financial representatives. Her disclosures addressed representatives accepting trades and soliciting sales without being properly registered or qualified, representatives maintaining pre-completed paperwork, and use of unapproved marketing materials and advertising. Anthony alleged that Tronco terminated her employment due to her persistence in reporting non-compliant practices.

Judge Kahn held that SOX does not protect Anthony because she neither alleged that she was providing services to the Northwestern Mutual Funds, nor that she reported any wrongdoing committed either by the Mutual Funds or on their behalf. Anthony’s disclosures about compliance issues implicated only Tronco Financial, a private company. The court enunciated two limitations on the scope of SOX whistleblower protection:

First, the whistleblowing must relate to the contractor’s provision of services to the public company. See Lawson, 134 S. Ct. at 1173. Thus, § 1514A only covers contractors insofar as they are firsthand witnesses to corporate fraud at a public company—for example, the lawyers and accountants in the Enron scandal who facilitated and contributed to the fraud. It does not cover contractor employees who experience retaliation that is unrelated to the provision of services to a public company. The second limitation is that § 1514A is concerned with public company fraud, whether committed by the public company itself or through its contractors. Gibney, 25 F. Supp. 3d at 747; see also Lawson, 134 S.
Ct. at 1173 (“[T]he contractor . . . fulfilling its role as a contractor for the public company, not the contractor in some other capacity.” (emphasis added)). . . . The effect of these 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.


Anthony is consistent with a decision from the Eastern District of Pennsylvania in Gibney v. Evolution Mktg. Research, LLC, 25 F.Supp.3d 741 (E.D. Pa. 2014). Leo Gibney worked for Evolution Marketing Research, a private consulting company that contracted its services out to many publicly-traded companies, including the pharmaceutical giant Merck. Id at 742. Evolution terminated Gibney’s employment after he reported to his supervisor that Evolution was fraudulently overbilling Merck for its services. Id. Gibney brought a SOX claim, and the district court held that even though Gibney had reported securities fraud, SOX did not apply because it protects only disclosures aimed at preventing fraud perpetrated by, rather than against, publicly-traded companies. Id. at 747-48. The court expressed concern that permitting Gibney’s claim to proceed would transform SOX into a general retaliation statute that would apply to any private company that transacts business with a public company. Id. at 748.

The Anthony and Gibney decisions apply an arguably overbroad rule to limit whistleblower protection for employees of contractors of public companies. It may be appropriate to restrict SOX coverage when an employer’s contract with a publicly-traded company is truly and only an incident to the relevant facts. However, Anthony and Gibney go beyond that narrow limitation to suggest a black-letter rule that would exclude a contractor employee’s disclosures from protection unless the disclosures pertain to fraud perpetrated by a publicly-traded company. As the Gibney court acknowledges, however, an employee’s disclosure of fraud by a contractor falls within the remedial purpose of SOX because fraud on the publicly-traded company could translate into fraud on the shareholders. Gibney, 25 F.Supp.3d at 747. And contrary to the reasoning in these decisions, a disclosure of a private company’s fraud where the publicly-traded corporation is the victim can easily fall within the statute’s specific purpose and should therefore be covered.

A public corporation’s merger with (or acquisition of) a private company is a good example of the need to broaden SOX protected conduct beyond fraud committed by a public company. If a private company being acquired by a public company misleads investors about its financial condition or its liabilities, shareholders of the public company will be defrauded. And accounting fraud that directly and intentionally deprives investors of substantial value is the exact type of fraud Congress sought to remedy with SOX. Accordingly, under such a scenario, SOX should protect disclosures of fraud from a contractor employee retained to review the transaction.

The anti-retaliation protections of SOX should extend to disclosures of securities fraud regardless of an arbitrary, dispositive distinction between whether the public corporation is the perpetrator or victim. Doing so will not open SOX to every action “that has some attenuated, negative effect on the revenue of a publicly-traded company” may very well be beyond the scope of SOX protected conduct. See Gibney, 25 F.Supp.3d at 748. Rather, a factual analysis of all the relevant circumstances is necessary to determine whether SOX should extend to any particular instance where a contractor employee is involved. Nonetheless, Anthony and Gibney suggest that the contractors of publicly-traded companies whose disclosures concern only wrongdoing by the contractor will not likely be protected under SOX, and whistleblowers should be aware of the potential obstacles these cases present to SOX retaliation claims.

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