No. ________

In The
Supreme Court of the United States

JACKIE HOSANG LAWSON and JONATHAN M. ZANG,

Petitioners,

v.

FMR LLC, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

INDIRA TALWANI
SEGAL ROITMAN, LLP
111 Devonshire St.
Fifth Floor
Boston, MA 02109
(617) 742-0208

KEVIN G. POWERS
RODGERS, POWERS & SCHWARTZ, LLP
18 Tremont St.
Boston, MA 02108
(617) 742-7010

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, forbids a publicly traded company, a mutual fund, or "any ... contractor [or] subcontractor ... of such company [to] ... discriminate against an *employee* in the terms and conditions of employment because of" certain protected activity. (Emphasis added). The First Circuit held that under section 1514A such contractors and subcontractors, if privately-held, may retaliate against their own employees, and are prohibited only from retaliating against employees of the public companies with which they work.

The question presented is:

> Is an employee of a privately-held contractor or subcontractor of a public company protected from retaliation by section 1514A?

PARTIES

The petitioners are Jackie Hosang Lawson and Jonathan M. Zang.

The respondents are FMR LLC, FMR Co. Inc., FMR Corp., Fidelity Brokerage Services, LLC, and Fidelity Management & Research Company. All of the respondents are privately-held companies.

No Fidelity mutual fund is a party to this action.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Petitioners Jackie Hosang Lawson and Jonathan M. Zang respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on February 3, 2012.

OPINIONS BELOW

The February 3, 2012 opinion of the Court of Appeals, which is reported at 670 F.3d 61 (1st Cir. 2012), is set out at pp. 1a-75a of the Appendix. The April 6, 2012 order of the Court of Appeals denying rehearing and rehearing en banc, which is not reported, is set out at pp. 134a-135a of the Appendix. The March 31, 2010 Memorandum and Order of the District Court for the District of Massachusetts, which is reported at 724 F.Supp.2d 141 (D.Mass. 2010), is set out at pp. 76a-133a of the Appendix.[1]

JURISDICTION

The decision of the Court of Appeals was entered on February 3, 2012. A timely petition for rehearing and rehearing en banc was denied on April 6, 2012.

[1] The District Court opinion certifying the question in this case for interlocutory appeal is reported at 724 F.Supp.2d 167 (D.Mass. 2010).

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The statutory provisions and regulations involved are set out in the Appendix.

STATEMENT OF THE CASE

Ten years ago, in the wake of the Enron and other financial scandals, Congress enacted the Sarbanes-Oxley Act, section 806 of which protects whistleblowers who disclose fraud or certain other unlawful activity to company management, to federal agencies, or to Congress. 18 U.S.C. § 1514A. In the instant case, over the vociferous objection of both the SEC (which enforces federal securities laws) and the Department of Labor (which is responsible for enforcing section 1514A), a sharply divided First Circuit held that section 1514A does not protect whistleblowers at privately-held firms, such as investment advisers or accountants, which are contractors or subcontractors for publicly traded companies or mutual funds.

> The facts here ... represent a paradigm that Congress intended to address in Section 806: A public company's private agent or contractor retaliating against an employee of that

> private firm for blowing the whistle on a potential violation of the federal securities laws....

(Brief of the Securities and Exchange Commission as Amicus Curiae in Support of Plaintiff-Appellees, p. 3.) Less than four months after the First Circuit decision, the Administrative Review Board ("ARB") of the Department of Labor, emphatically rejecting the reasoning of the court of appeals, held that section 1514A does protect such whistleblowers. *Spinner v. David Landau and Associates, LLC,* 2012 WL 2073374 (ARB May 31, 2012). The Board's decision is controlling in the administrative adjudication of section 1514A claims arising in every circuit other than the First Circuit. (*See* App. 145a n.10).

The defendants are the privately-held parent company and several subsidiary companies that operate the Fidelity family of mutual funds, the largest mutual fund company in the United States, investing approximately $1.4 trillion on behalf of millions of fund investors. Each of the hundreds of Fidelity mutual funds is a separate registered investment company required to file reports with the SEC under section 15(d) of the Securities and Exchange Act of 1934. 15 U.S.C. § 78o(d). At Fidelity, as is true of the mutual fund industry generally, a mutual fund itself has no employees of its own. Rather, the directors of a mutual fund contract with an "investment adviser," which in turn conducts all the activities of the funds, making day to day investment decisions, performing a range of management and administrative tasks, and preparing reports for shareholders and the SEC. Employees in the mutual fund industry ordinarily work for mutual fund adviser or sub-advisers, not for a mutual fund itself. The defendants in this case are investment advisers, or sub-advisers, to particular Fidelity mutual funds.

Jackie Hosang Lawson was a Fidelity employee for fourteen years; at the time of the events giving rise to this action Lawson was a Senior Director of Finance. Beginning in 2005, Lawson raised a series of objections to the manner in which FMR Co., the investment adviser to the Fidelity mutual funds, and its Fidelity Brokerage Services, were calculating the expenses that they reported as having been incurred in carrying out its contractual obligations to operate those funds. The amount of those expenses determined the amount of profit reported by FMR Co., and ultimately affected the amount of the fee which the mutual funds would pay to FMR Co. By inflating its expenses, FMR Co. could effectively increase the fees it would earn from the mutual funds, fees ultimately paid by the shareholders of the mutual funds. Lawson objected both to the manner in which the expenses had been calculated and to the failure of FMR Co. to disclose the disputed methodology to the Trustees, Directors or Audit Committee of the Fidelity Mutual Funds. The complaint alleged that approximately $100 million was being improperly treated as an expense for providing shareholders with information relating to the status of their existing accounts in Fidelity mutual funds. When Fidelity officials persisted in this misallocation of expenses, Lawson wrote to Fidelity's General Counsel, explaining the problem and expressing the concern that the scheme constituted fraud against the mutual funds' shareholders. Lawson also alleged that a group within Fidelity Brokerage had improperly retained $10 million in fees that belonged to third-parties. (App. 80a and n.2).

In response to her repeated objections, Lawson was subjected to a series of adverse actions. Lawson filed complaints about this retaliation with the Occupational Safety and Health Administration ("OSHA") of the Department of Labor, the federal agency responsible for administrative enforcement of section 1514A. In July 2007 a supervisor advised Lawson that she should take a "sabbatical" because "it was impossible for her to continue working at Fidelity Investments because of the claims she had made to OSHA and the SEC."[2] In November 2007 Lawson resigned, contending that the defendants' campaign of harassment had made her working conditions intolerable.

Jonathan Zang worked for several of the respondents, most recently FMR Co., Inc., as an equity research analyst. In early 2005 Zang objected to a draft Statement of Additional Information which the defendants proposed to file with the SEC. Zang

---

[2] Lawson Amended Complaint, ¶ 65.

pointed out that the Statement contained misleading information about the manner in which portfolio managers were compensated. After several emails and a meeting between Zang and higher officials, Fidelity agreed to revise the statement along the lines Zang had urged. During the same period Zang also objected that the defendants were operating several "veiled index funds," funds which are essentially unmanaged index funds but for which the Fidelity investment adviser was improperly collecting a fee for active management that had not really occurred. In June 2005, two months after the defendants had submitted the revised Statement to the SEC, Zang was dismissed. Zang, like Lawson, filed a complaint with OSHA.

Lawson and Zang ultimately commenced the instant actions in federal district court. Fidelity moved in each case to dismiss the complaints. Lawson and Zang were both employees of one of the private Fidelity entities; neither worked for any of the Fidelity mutual funds, none of which had any employees. Fidelity argued that the only "employees" protected from retaliation by section 1514A are individuals who work for a publicly traded company or for a company, such as a mutual fund, required to file reports under section 15(d) of the Securities and Exchange Act, firms which the courts below referred to as "public companies." Section 1514A does forbid retaliation by a "contractor" of such a public company. Fidelity insisted, however, that section 1514A does not bar a contractor from retaliating against its *own* employees, but only forbids a contractor to somehow retaliate against an employee of the public company with which it is doing business.

The District Court denied Fidelity's motions to dismiss.[3] It concluded that section 1514A can apply to employees of contractors, not themselves public companies, that have contracts with public companies such as a mutual fund. The District Court specifically held that section 1514A protects employees of contractors that engage in activity "that relates to fraud against shareholders." (App. 116a). The District Court certified for interlocutory appeal under 28 U.S.C. § 1292(b) the question of whether section 1514A applies to employees of contractors, and the court of appeals granted the petitions for interlocutory review. (App. 8a-9a). The Department of Labor[4] and the SEC[5] filed amicus briefs urging the First Circuit to affirm the District Court opinion.

A sharply divided panel of the First Circuit overturned the District Court decision and ordered the dismissal of the complaints. The majority reasoned that the only "employee[s]" protected by section 1514A are individuals who work for a public company. (App. 10a-51a). The majority therefore concluded that section 1514A only forbids contractors

---

[3] Although the cases were not consolidated, the District Court considered and resolved both motions in a single decision.

[4] 2011 WL 1977768.

[5] 2011 WL 1977769.

and subcontractors to retaliate against employees of the public companies with which they work, and permits those contractors and subcontractors to retaliate against their own employees. A lengthy dissent argued that section 1514A does protect employees of contractors and subcontractors that do business with public companies.

On April 6, 2012, the First Circuit, by a vote of 3 to 2, denied a timely petition for rehearing en banc. (App. 134a-135a). Two months later the Administrative Review Board of the Department of Labor reached the opposite conclusion, holding that employees or such contractors and subcontractors are protected by section 1514A. *Spinner v. David Landau and Associates, LLC*, 2012 WL 2073374 (ARB May 31, 2012) (App. 136a-199a).

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The Sarbanes-Oxley Act was adopted in 2002 following the collapse of a series of major corporations, most notably Enron, which (with the involvement of its accounting firm, Arthur Andersen) had used a variety of accounting and other tricks to hide losses and deceive investors.

> Enron apparently, with the approval or advice of its accountants, auditors and lawyers, used thousands of off-the-book entities to

> overstate corporate profits, understate corporate debts and inflate Enron's stock price.... The actions of Enron's ... accountants, ... and lawyers exhibit a "Wild West" attitude which valued profit over honesty.... Much of this conduct occurred with "extensive participation and structuring advice from [the accounting firm of Arthur] Andersen, which was.... serving as ... "independent" auditor for Enron.

(S.Rep. 107-146, pp. 2-3). Similar schemes preceded the collapse of a number of other companies, including Tyco International Ltd. and WorldCom, Inc., causing severe losses to employees, retirees, pension funds, and private investors, and seriously undermining public confidence in the stock market.

Congress concluded that this financial chicanery had continued in part because those who were aware of the misconduct were deterred from reporting it.

> In a variety of instances when corporate employees at both Enron and Andersen attempted to report or "blow the whistle" on fraud ... they were discouraged at nearly every turn.... An Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices in 2000. These examples ... expose a culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally. This "corporate code of

> silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.

(S.Rep. 107-146, p. 4-5) (footnote omitted). Federal law prior to the enactment of Sarbanes-Oxley afforded no protection to those who might have reported these schemes.

> [C]orporate whistleblowers are left unprotected under current law. This is a significant deficiency because often, in complex fraud prosecutions, these insiders are the only firsthand witnesses to the fraud. They are the only people who can testify as to "who knew what, and when," crucial questions ... in all complex fraud investigations.

(S.Rep. 107-146, p. 10).

The Sarbanes-Oxley Act responded to these financial scandals by imposing new substantive requirements on publicly owned corporations and their lawyers and accountants, and by enacting in section 806 of the Act a prohibition against retaliating against those who report certain types of misconduct, such as violations of the securities laws.[6]

Section 806(a) of Sarbanes-Oxley, now codified in 18 U.S.C. § 1514A(a), provided[7] that

> [n]o company with a class of securities registered under section 12 of the Securities Exchange Act ... , or that is required to file reports under section 15(d) of the Securities Exchange Act ... , or any officer, employee,

---

[6] "The Senate Judiciary Committee's report on the Act ... listed whistleblower protection as one of three main purposes of the Act." *Solis v. Tennessee Commerce Bancorp, Inc.,* 13 F.Supp.2d 701, 714 (M.D.Tenn. 2010). Congress "viewed protecting whistleblowers as crucial means for assuring that corporate fraud and malfeasance would be publicly exposed and brought to light from behind the corporate veil." *Johnson v. Siemens Bldg. Tech.,* 2011 WL 1247202 at *10 (ARB March 31, 2011). "[W]histleblower tips are among the most effective means of revealing financial frauds and accounting scandals." *United States v. Marino,* 654 F.3d 310, 322 (2d Cir. 2011).

> Congress recognized that the problem was an intractable one, and that a number of strong enforcement tools would be necessary.... Congress also recognized that for *any* of these tools to work, the law had to protect whistleblowers from retaliation.... Congress made clear ... that it viewed corporate whistleblowers as ... essential ... combatants against corporate malfeasance.

Bechtel v. Competitive Tech., 448 F.3d 469, 484-86 (2d Cir. 2006) (Straub, J., dissenting) (emphasis in original).

[7] The Dodd-Frank Act amended section 1514A to apply as well to certain subsidiaries of public companies and to certain nationally recognized statistical rating organizations. (*See* App. 204a).

> 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 [protected] act done by the employee....

(Emphasis added). Companies whose securities are registered under section 12 are commonly referred to as publicly traded companies, because section 12 deals primarily with the registration of corporations that are traded on the national stock exchanges. 15 U.S.C. § 78l. Companies required to file reports under section 15(d) are generally those firms (such as mutual funds) that issue securities that may be sold to the public, but that are not publicly traded companies subject to section 12. 15 U.S.C. § 78o(d). The lower courts use the phrase "public company" to encompass both firms that are publicly traded (and thus subject to section 12) and firms that are not traded on a national exchange but are subject to section 15(d).

Section 1514A expressly applies to contractors and subcontractors of these public companies, as well as to the public companies themselves. Often, as in the instant case, the contractors and subcontractors – like the Arthur Andersen firm implicated in the Enron scandal – are not themselves public companies. The question that divides the First Circuit and the Administrative Review Board concerns the identity of the "employee[s]" against whom a contractor or subcontractor is forbidden to retaliate.

A majority of the First Circuit held that under section 1514A privately-held contractors and subcontractors can retaliate against *their own* employees, and are prohibited only from retaliating against employees of the public companies with which they work. As applied to the participants in the original Enron scandal, the First Circuit means that section 1514A would only have forbidden Arthur Andersen from somehow retaliating against a whistleblower who worked for Enron itself, but would have allowed Arthur Andersen to use retaliation to prevent its own employees from reporting Enron-related fraud to the SEC, to the Congress, or to managers or directors of either firm. Both the Department of Labor, which is responsible for enforcing section 1514A, and the SEC, which enforces the securities laws, emphatically disagreed with the First Circuit's narrow interpretation of the statute.

II. THERE IS A CLEAR CONFLICT BETWEEN THE DECISION OF THE FIRST CIRCUIT AND THE DECISION OF THE DEPARTMENT OF LABOR ADMINISTRATIVE REVIEW BOARD IN *SPINNER V. LANDAU*

The First Circuit in the instant case held that section 1514A does not protect employees of privately held contractors or subcontractors that work with public companies. "[We] read[ ] 'employee' as excluding from coverage employees of ... contractors, subcontractors and agents of public companies...." (App. 16a). Less than four months later, the Administrative

Review Board of the Department of Labor ("ARB") unanimously reached the opposite conclusion. "The overall statutory framework and purpose demonstrate, indeed require, that section 1514A protects whistleblowing by employees of contractors and subcontractors to the public company." *Spinner v. David Landau and Associates, LLC*, 2012 WL 2073374 (ARB May 31, 2012) (App. 161a). Because the ARB will apply the decision in *Spinner* to administrative claims arising in every circuit other than the First Circuit, this conflict should be resolved by this Court. (*See* App. 145a n.10).

Section 1514A establishes two distinct enforcement mechanisms, one administrative and the other judicial. First, an individual may pursue an administrative complaint, filing a complaint with OSHA, followed by discovery and a hearing before an administrative law judge and ultimately an appeal to the Administrative Law Board of the Department of Labor.[8] 18 U.S.C. § 1514A(b)(1)(A). Second, an aggrieved individual may bring a civil action in district court, provided that he or she first submits a complaint to the Secretary of Labor and waits 180 days. 18 U.S.C. § 1514A(b)(1)(B). Under section 1514A the complainant is permitted to choose between administrative and judicial adjudication. The stark difference between the First Circuit decision in *Lawson* and the

[8] Final decisions by the ARB are subject to limited judicial review. 49 U.S.C. § 42121(b)(4).

ARB decision in *Spinner* is now of controlling importance to a complainant's choice of forum.

The First Circuit and the ARB were particularly deliberate in precipitating this conflict. The First Circuit was well aware that even before *Spinner* the ARB had held that section 1514A is not limited to employees of public companies.[9] The court of appeals expressly refused to give any weight to that earlier ARB decision. The panel majority then went further and preemptively disagreed in advance with any future more definitive ARB decision. "[I]f there were an on-point holding of the ARB, it might be entitled to some deference as to any ambiguity in the statute. The point is irrelevant.... [W]e find no ambiguity, so no deference is owed." (App. 50a).[10] The First Circuit repeatedly insisted that the text of section 1514A was crystal clear.[11]

---

[9] "In dicta to which no deference could be owed, the ARB stated [in *Johnson v. Siemens Technologies, Inc.*] that SOX's 'legislative history demonstrates that Congress intended to enact robust whistleblower protections for more than employees of publicly traded companies.' 2011 WL 1247202 at *12." (App. 50a-51a n.25; *see* App. 14a n.7).

[10] "Because the term 'employee' in § 1514A(a) is not ambiguous, we would not defer to an administrative agency's contrary determination...." (App. 46a).

[11] App. 22a ("We do not think there is any ambiguity left"), 31a n.15 ("we conclude that the text of § 1514A(a) is unambiguous"), 49a ("the text of the statute does not permit even [*Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1044)] deference"), 51a ("we view the text of § 1514A(a) as clear").

In its post-*Lawson* decision, on the other hand, the ARB emphatically rejected the holding of the First Circuit. "The First Circuit's *Lawson* holding is not controlling in this case, and we decline to adopt it.... [W]e cannot conclude that Section 806 is limited to employees of public companies." (App. 145a). The ARB pointedly objected that the First Circuit had adopted its narrow construction of section 1514A "notwithstanding" the ARB's earlier decisions which had "repeatedly interpreted Section 806 as affording whistleblower protection to employees of contractors, subcontractors or agents of publicly traded companies, regardless of the fact that the contractor, subcontractor or agent was not itself a publicly traded company." (App. 143a). The ARB took the unusual step of deliberately issuing an exhaustive rebuttal to the First Circuit opinion, explaining that "in light of the First Circuit's decision in *Lawson*, it is imperative to fully explain the basis for our holding." (App. 145a). One member of the ARB added a lengthy concurring opinion for the express purpose of spelling out in even greater detail why he believed that the reasoning of the First Circuit was unsound. (App. 167a, 173a). Both the majority and concurring ARB opinions repeatedly cited the reasoning of the dissenting opinion in the First Circuit.[12]

---

[12] App. 149a, 154a n.15 (majority opinion), 180a, 180a n.41, 181a n.43, 188a (Brown, J. concurring).

The First Circuit and ARB decisions systematically canvassed the same grounds and arrived at diametrically opposed conclusions. The First Circuit insisted that "the more natural reading" of the text of section 1514A(a) is limited to protecting employees of public companies. (App. 16a). The ARB concluded, to the contrary, that "[t]he plain language of the statute does not restrict its application to employees of publicly held companies." (App. 148a). The First Circuit asserted that its construction of section 1514A had not rendered meaningless the statutory language applying to contractors and subcontractors.[13] The ARB reasoned that limiting section 1514A(a) to employees of public companies would render superfluous the statutory language forbidding retaliation by contractors and subcontractors, because it would be virtually impossible for a contractor or subcontractor to retaliate against an employee of the public company. (App. 150a). The First Circuit argued that "employee" must refer only to employees of a public company because section 1514A(a) forbids retaliation *by* employees (App. 18a); the ARB rejected that reasoning. (App. 149a). The First Circuit had relied particularly on the heading of section 1514A(a), which it believed demonstrated that Congress intended to protect only employees of public companies. (App. 19a-22a). The ARB concluded that the heading conveyed no such meaning. (App. 151a-152a).

---

[13] App. 17a (majority's construction "does not violate the rule against rendering superfluous any statutory language").

The First Circuit asserted that its narrow "reading of 'employee' ... is ... strongly confirmed by the pre-passage legislative history of this section." (App. 16a; *see* App. 37a). The ARB concluded, to the contrary, that "[n]othing in the SOX's legislative history indicates that Congress intended to limit whistleblower protection under Section 806 to only employees of publicly traded companies." (App. 154a). The First Circuit maintained that its narrow construction of section 1514A was supported by the report of the Senate Judiciary Committee and the remarks of the bill's sponsor, Senator Leahy. (App. 37a-39a). The ARB concluded that those very legislative materials instead supported the ARB's own broader interpretation of the law. (App. 154a-159a, 181a-184a). Similarly, the First Circuit reasoned that its decision to limit "employee" to employees of public companies was "strongly confirmed by ... the purpose of the legislation." (App. 16a). But the ARB insisted, to the contrary, that "[a]n interpretation limiting protection of whistleblowers to those only directly employed by a publicly traded company would sabotage the overriding purpose of protecting investors. (App. 160a-161a).

The First Circuit maintained that Congress never intended section 1514A(a) to prohibit retaliation against employees of the accounting firms or outside counsel who contract with public companies. (App. 23a-25a). The ARB insisted that it was precisely those outside professionals whom Congress sought to protect when it adopted section 1514A(a). (App. 158a, 158a-159a n.16). Both the First Circuit and the

ARB compared the wording of section 1514A(a) with the terms of other federal anti-retaliation provisions. The First Circuit insisted that comparison demonstrated that section 1514A(a) excludes employees of contractors and subcontractors (App. 28a-33a); the ARB concluded that the same comparison demonstrated the opposite. (App. 161a-165a).

This case presents precisely the situation in which review by this Court is warranted because of a conflict between the decision of a court of appeals and the authoritative construction of a statute issued by the administrative agency which administers that law. E. Gressman, K. Geller, S. Shapiro, T. Bishop and E. Hartnett, SUPREME COURT PRACTICE, p. 268 (9th ed. 2007). The ARB has made clear that it would apply *Spinner* rather than *Lawson* except in a case which arose in the First Circuit.[14] Thus administrative law judges in every state outside the First Circuit will be bound by *Spinner* in deciding section 1514A claims. Claimants in any of those other eleven geographical circuits can invoke the more favorable standard in the ARB *Spinner* decision by pursuing their claims in the administrative process, rather than by proceeding in district court, where the defendant could attempt to persuade a federal judge to follow the First Circuit decision in *Lawson* rather

[14] App. 145a n.10 ("The case before us did not arise in the First Circuit, so we are not bound by *Lawson*.")

than the ARB decision in *Spinner*.[15] This will inevitably result in forum shopping until and unless this Court definitively resolves the meaning of section 1514A. An employer will as a practical matter be subject to different standards depending on where an employee worked or resided at the time of the alleged retaliation, a difference that is particularly problematic because many of the affected firms are national employers. In theory an employer may seek review of a final ARB decision in a court of appeals. However, an employer could do so only after the final resolution of the administrative process, which includes an investigation by OSHA, a period of discovery, an evidentiary hearing before an administrative law judge, and an appeal to (and possible remand from) the ARB, a lengthy process that can easily take four years or more when the claimant prevails.[16]

---

[15] One prominent management side law firm noted that in the wake of *Spinner* "complainants can be expected to pursue their claims through the DOL's adjudicative regime, rather than remove them to federal courts ... in cases where coverage ... [is] questionable." http://www.seyfarth.com/publications/omm060612, visited June 12, 2012.

[16] *See, e.g., Ameristar v. Administrative Review Board,* 650 F.3d 562 (5th Cir. 2010) (seven years of administrative proceedings) (*see* Brief for Petitioners, 2010 WL 8019944); *R & B Transp., LLC v. United States Department of Labor*, 618 F.3d 37, 41 (1st Cir. 2010) (four years and 6 months of administrative proceedings); *Bechtel v. Secretary of Labor*, 50 F.3d 926, 930 (11th Cir. 1995) (seven years of administrative proceedings).

Spinner itself concerned a dismissal that occurred in 2008. (App. 138a). After almost four years of administrative proceedings,

(Continued on following page)

Concern that whistleblowers would be protected only in some parts of the country but not in others was one of the factors that induced Congress to enact section 1514A.[17] Today employees in the 46 states outside the First Circuit can utilize the administrative adjudicative process to invoke the protections of section 1514A that are denied to similar workers in the First Circuit. Without action by this Court, this conflict will continue until and unless *all* of the other geographical circuits have rejected the ARB decision in *Spinner* in favor of the rule in *Lawson*, an eventuality unlikely ever to occur.

III. THE FIRST CIRCUIT HAS DECIDED A QUESTION OF GREAT IMPORTANCE THAT SHOULD BE RESOLVED BY THIS COURT

This case presents a question of pivotal importance to the integrity of the securities markets

---

the ARB in *Spinner* remanded the case to the ALJ for further proceedings. There still has not been an evidentiary hearing before an ALJ in that case.

[17] Corporate employees who report fraud are subject to the patchwork and vagaries of current state laws, although most publicly traded companies do business nationwide. Thus a whistleblowing employee in one state may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions. Unfortunately, ... efforts to quiet whistleblowers and retaliate against them for being "disloyal" or "litigation risks" transcend state lines.

(S.Rep. 107-146, p. 19).

and to the preservation of investor confidence. In the proceedings below the SEC and the Department of Labor emphatically cautioned the First Circuit that denying whistleblower protection under section 1514A to the hundreds of thousands of employees at issue would seriously interfere with efforts to prevent and correct violations of federal securities laws and rules. Despite the fully articulated concerns of the SEC, which has the critical responsibility of ending fraud and misrepresentation in the securities industry, a divided panel of the First Circuit carved into section 1514A precisely the massive loophole against which the government had warned. Under the First Circuit's decision, most investment fund advisers and most accounting firms are free to openly impose on their employees the very "code of silence" which the Senate committee warned "creates a climate where ongoing wrongdoing can occur with virtual impunity." (S.Rep. 107-146, p. 5). At a time when the nation's securities and financial markets remain in turmoil, and investor confidence is shaken on almost a daily basis, this dispute about the scope of section 1514A is a matter of the utmost importance that should be definitively resolved by this Court.

The SEC has made absolutely clear its belief that a broad interpretation of section 1514A is essential to the protection of investors.

> Were this court to limit the application of Section 806 to only employees of public companies, ... many ... professionals who are most likely to uncover evidence of federal

> securities law violations by the public companies they work with would be excluded from Section 806's whistleblower protections. Such a reading would impede the Commission's protection of investors as it would deter potential whistleblowers employed by privately-held agents or contractors from reporting possible securities violations by the public companies for whom they are performing work.

(Brief of the Securities and Exchange Commission as Amicus Curiae in Support of Plaintiff-Appellees, p. 1) (footnote omitted). The Department of Labor pointed out the same danger.

> The consequences of excluding the employees of contractors and subcontractors of public companies from section 806's protections would be dramatic.... The employees of a mutual fund's advisers ... would be unprotected by SOX's whistleblower provision, notwithstanding their knowledge of whether the funds they manage are complying with legal requirements designed to prevent SEC violations and shareholder fraud. Other categories of employees with specific knowledge of corporate activity, such as outside accountants and auditors, likewise would be unprotected. Such a result would be inconsistent with Congress' intent to provide whistleblower protection to those particularly well-positioned to blow the whistle on potential securities violations and shareholder fraud.

(Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees, p. 22-24).

(1) The consequences of the First Circuit decision are particularly serious for the mutual fund industry. A mutual fund itself is a public company required to file reports with the SEC under section 15(d). However, as the court of appeals acknowledged, most mutual funds themselves have no employees. (App. 4a). Virtually all of the workers in the mutual fund industry are employed, not by the funds, but by investment advisers, and many of the advisers themselves are privately-held companies. Thus if, as the First Circuit held, section 1514A applies only to employees of public companies and not to privately-held firms (such as investment advisers) which contract with those companies, that anti-retaliation provision would not protect most of the employees in the mutual fund industry. In the case of Fidelity, which manages over $1.4 trillion in mutual fund assets and which employs approximately 39,000 individuals, there would not be a single worker who would be protected by section 1514A. The SEC expressly warned the First Circuit that limiting section 1514A to employees of public companies would have this drastic result.[18] In adopting its

[18] [Limiting Section 806 to employees of public companies] would insulate from section 806 liability investment advisers and other private entities that employ nearly all of the persons who perform work for mutual funds, along with the professionals most likely to learn of possible material securities law

(Continued on following page)

narrow construction of section 1514A, the court of appeals emphatically embraced that very consequence of its decision.[19]

> violations by their publicly-traded clients. Although investment companies, including mutual funds, file reports under Section 15(d) of the Exchange Act, nearly all mutual funds are structured so as to have no employees of their own, and instead rely on non-publicly traded third-parties, principally privately-held investment advisers to function.... If this Court construes Section 806 as applying only to publicly-traded companies, it would place employees of investment advisers, an industry with nearly 157,000 employees that manage more than $12 trillion on behalf of investors, potentially outside the scope of SOX's whistleblower protections.

Brief of the Securities and Exchange Commission as Amicus Curiae in Support of Plaintiff-Appellees, pp. 20-21 (footnote omitted).

[19]
> Congress's primary concern in enacting SOX was not the activities of the advisers to mutual funds ... like the Fidelity funds here. Indeed, Congress knew that investment companies like the Fidelity mutual funds often do not have their own employees.... And if they have no employees, they are not subject to § 1514A.... Had Congress intended to extend § 1514A whistleblower coverage protections to the employees of private companies that have contracts to provide investment advice to [mutual] funds ... , it would have done so explicitly in § 1514A(a).

App. 26a-28a; *see* App. 36a ("Had Congress intended to ... cover the employees of private investment advisers for whistleblower protections, it would have done so explicitly in § 1514A(a). However, it did not.").

The SEC also warned the court below that limiting section 1514A to employees of public companies would effectively exclude from its protections employees of the outside accounting firms, like the now defunct Arthur Andersen, that audit the nation's public companies.

> [Restricting section 806 to employees of public companies] would ... leave unprotected professionals, such as outside accountants, auditors, and lawyers, who are most likely to uncover and comprehend evidence of potential violations. Regarding accountants and auditors, the so-called "Big-Four" firms are comprised of four private companies – PricewaterhouseCoopers, Ernst & Young, Deloitte & Touche and KPMG. The Big Four dominate the auditing industry with respect to public companies, auditing nearly 97 percent of "large accelerated filers" and 67 percent of "accelerated filers." If SOX's whistleblower provisions were held not to apply to private contractors, ... the employees of the Big Four, as well as other private accounting and auditing firms, would be virtually unprotected under Section 806.

(Brief of the Securities and Exchange Commission as Amicus Curiae in Support of Plaintiff-Appellees, pp. 22-23) (footnotes omitted). Because virtually all large public companies are audited by one of these privately-held accounting firms, denying whistleblower protection to all of their workers would permit these key accounting firms to suppress information that may be of vital importance to ending unlawful practices.

Again, however, the court of appeals expressly endorsed that result of its decision, insisting that Congress did not want to extend whistleblower protection to the employees of accounting firms.[20] The First Circuit's conclusion is particularly surprising because the Senate report expressed specific concern that the Enron fraud had been facilitated when Arthur Andersen retaliated against an Andersen accountant who had questioned Enron's manipulative practices. (*See* p. 9, *supra*). As the SEC has observed, "[t]he legislative history discusses not only Congress' objective of protecting whistleblowing by employees of a public company, but also by employees of private firms that work with, or contract with, that issuer."[21]

> The legislative history of Sarbanes-Oxley would seem to confirm that Section 806 was meant to include an agent or contractor like

---

> [20] Congress's concern about Arthur Andersen was addressed by special provisions as to accountants.... The committee's concerns regarding the integrity and independence of accountants and auditors are addressed in SOX by virtue of these provisions and not by an expansive definition of "employee" in § 1514A(a).

(App. 40a).

[21] Brief of the Securities and Exchange Commission as Amicus Curiae, *Klopfenstein v. Administrative Review Board,* No. 10-60144 (5th Cir.), p.10.

> the accounting firm Arthur Andersen, not because there was any evidence that Andersen implemented Enron's personnel actions, but because Congress hoped an insider in an Arthur Andersen situation would blow the whistle on the type of fraud Arthur Andersen helped to conceal.

Walters v. Deutsche Bank AG, 2009 WL 6496755 at *7 (ALJ March 23, 2009).

Absent coverage by section 1514A, contractors could in a variety of ways suppress disclosure of misconduct that otherwise would fall within the scope of section 1514A(a). A mutual fund adviser could dismiss a worker for tipping off fund directors about fraudulent calculations by that investment adviser. An accounting firm could fire an employee for notifying a congressional committee about fraud by an audited firm, or for alerting the Office of the Comptroller of the Currency about malfeasance by a bank. These problems are not limited to suppression of information by mutual fund advisers and accounting firms. As the United States Chamber of Commerce advised the court below, "[p]ublicly held companies increasingly look to third party service providers, whether by way of outsourcing relationships or one-time engagements, to handle both core and non-core functions.... Many of these [are] private companies."[22]

---

[22] Brief of *Amicus Curiae* Chamber of Commerce of the United States of America in Support of Appellants' Petition for Interlocutory Review, pp. 2-3.

(2) The First Circuit's crabbed interpretation of section 1514A seriously undermines several important regulatory schemes established by the SEC.

In April 2003, as provided by section 301 of Sarbanes-Oxley, the SEC issued a rule directing that the national securities exchanges and national securities associations compel every issuer to create an independent audit committee and to establish a procedure for "[t]he receipt, retention, and treatment of complaints received by the listed issuer regarding accounting, internal accounting controls, or auditing matters." 17 C.F.R. § 240.10A-3(b)(3)(i). The purpose of this complaint process requirement is to "facilitate disclosures, encourage proper individual conduct, and alert the audit committee to potential problems before they have serious consequences." 60 Fed.Reg. 18818, 18798 (April 16, 2003). The requirement "includes complaints received by a listed issuer regardless of source." *Id.* The SEC noted that such an audit committee would often need to rely on information from "outside auditors," and that "investment companies rarely have direct employees" and instead obtain most services from "employees of third parties, such as the investment adviser." *Id.* Obviously this SEC mandated complaint process could work as intended only if complainants who use that process were protected against retaliation for doing so. The SEC recognized that "[a] company employee *or other individual* may be reticent to report concerns regarding questionable accounting or other matters for fear of management reprisal," *id.,* (emphasis added), noting that section 1514A provides protections for those "who provide evidence of fraud." *Id.* n.107. If section 1514A applies only to employees at public companies, *none* of the individuals who might complain to most SEC-mandated mutual fund audit committees (in this instance, none of the individuals who might complain to the Fidelity funds' audit committee) would be protected against reprisals.

In August 2003, pursuant to section 307 of Sarbanes-Oxley, the SEC issued a regulation requiring attorneys appearing and practicing before the Commission to report up the chain of command if they "become[ ] aware of evidence of a material violation [of federal or state securities law] by the issuer or by any officer, director, employee, or agent of the issuer." 17 C.F.R. § 205.3(b). The regulation does not compel attorneys to take affirmative steps to detect such violations; a covered attorney is required to act only if anyone else brings to his or her attention credible evidence of a violation. *See* 17 C.F.R. § 205.2(e). For that reason, this regulatory scheme could be seriously undermined if an employer were able to isolate attorneys from potentially inculpatory information by punishing any employee who provided such evidence to an attorney subject to the obligations of section 205.3(b). Under the First Circuit decision, the defendants are free to use such sanctions to deter employees from disclosing to Fidelity's attorneys information which Fidelity preferred that those attorneys not have.

In section 922 of the 2010 Dodd-Frank Act, Congress required the SEC to award to certain informants who provided to the SEC original information about securities law violations between 10 and 30 percent of any resulting penalty or disgorgement over $1 million collected by the government. 15 U.S.C. § 78u-6.[23] In its implementing regulations, the SEC deliberately created important incentives to encourage potential informants to utilize a company's internal compliance and reporting systems before contacting the Commission. 76 Fed.Reg. 34300, 34301 (June 13, 2011).[24] These provisions would apply to an employee of a privately held investment adviser who reported such violations to an internal compliance or reporting system established either by the adviser or by the mutual fund affected. But this system of incentives for internal reporting would be unlikely to succeed if a potential informant could be dismissed

[23] The awards are not available to certain employees of accounting firms. *See* 17 C.F.R. § 240.21F-4(a)(4).

[24] A whistleblower's voluntary participation in an entity's internal compliance and reporting system is a factor that can increase the amount of the reward. 17 C.F.R. § 240.21F-6(a)(4). If such an internal report leads the entity itself to provide information to the SEC, the whistleblower will get credit – and potentially a greater reward – for any additional information generated by the entity in its own investigation. 17 C.F.R. § 240.21F-4(c)(3). In addition, an informant who initiates such an internal report is accorded additional time to thereafter report to the SEC, and is given the benefit of a 120 day "look back." 17 C.F.R. § 240.21F-4(b)(7).

for providing that information to either firm's internal compliance and reporting system.

More generally, applying section 1514A to internal complaints at mutual fund advisers, accounting firms, and other contractors protects the ability of those firms, and of the public companies with which they work, to detect and correct improper practices. As the United States Chambers of Commerce has pointed out,

> all stakeholders benefit when those with knowledge of potential securities law violations report internally.... With timely access to information about potential problems, companies can address and punish wrongdoing, avoid lawsuits, improve efficiency and reduce costs.... Internal reporting also complements the activities of the SEC and other government agencies by freeing them to focus their resources and energies on those companies that are unwilling or unable to take remedial action on their own.[25]

In the wake of the court of appeals' decision in the instant case, however, prudent employees will have good reason to avoid using a company's internal procedures to report potential illegality.

---

[25] Letter of Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, Dec. 17, 2010, pp. 3-4, available at: http://www.sec.gov/comments/s7-33-10/s73310-194.pdf (visited June 20, 2012).

(3) The First Circuit's interpretation of section 1514A also threatens to undermine the operation of the Investment Company Act. Because a mutual fund is generally established by the very investment adviser that contracts to conduct a fund's actual operations, there is an inherent risk that the fund itself will acquiesce in excessive adviser fees. To prevent that abuse, the Investment Company Act requires that a mutual fund have a board of directors that is independent of the investment adviser and that can operate as an independent watchdog of the relationship between the fund and its adviser. "Under the Act, scrutiny of investment adviser compensation by a fully informed mutual fund board is the 'cornerstone of the ... effort to control conflicts of interest within mutual funds.' *Burks [v. Lasker*,] 441 U.S. [471,] 482 [(1979)]." *Jones v. Harris Associates L.P.,* 130 S.Ct. 1418, 1427-28 (2010). But a fund's directors cannot perform that essential function unless they have all relevant information. An investment adviser has a significant financial incentive to withhold information that might prompt the directors to question or reduce the fees the fund pays, and thus a similar incentive to muzzle employees who might alert fund directors to such information. That is precisely what Lawson alleges occurred in the instant case.

IV. THE QUESTION PRESENTED SHOULD BE RESOLVED BY THIS COURT WITHOUT FURTHER DELAY

The unique circumstances and unusual importance of this case warrant action by this Court now to resolve the question that has divided the First Circuit and the ARB. The combined effect of these decisions has created the worst of both worlds: employees have good reason to fear that they do not enjoy the protection of the law if they engage in whistleblowing, and employers lack certainty as to when under federal law they can lawfully require workers to remain silent.

In the proceedings below both the SEC and the Department of Labor warned that a narrow interpretation of section 1514A would chill whistleblowing in the mutual fund industry and among the professionals who work with public companies. (*See* p. 23, *supra*). As the SEC admonished on another occasion, "limit[ing] the application of Section 806 only to employees of public companies.... would deter potential whistleblowers from coming forward."[26] Those well-founded admonitions reflect the unique nature of the nation's capital markets and of the securities industry. The leading firms all operate on a nationwide basis; Fidelity, for example, has 170 offices throughout the country. The stock-in-trade of the entire securities industry is information, which is constantly being generated, shared and analyzed by professionals in the field. In this environment, news of the First Circuit decision in *Lawson* spread rapidly throughout the industry. Scores of industry websites

[26] Brief of the Securities and Exchange Commission as Amicus Curiae, *Klopfenstein v. Administrative Review Board*, No. 10-60144 (5th Cir.), p. 2.

and services warned employees, and heartened employers, with reports and analyses of the action of the court of appeals. Employees of investment advisers and professionals in the offices of major accounting firms throughout the country are assuredly all too well aware of *Lawson* and its implications.

The ARB decision in *Spinner* cannot undo the deterrent impact of *Lawson*. Workers of ordinary prudence are unlikely to risk their careers on a gamble that their employers will opt to follow the strictures of *Spinner* rather than exploit the loophole created by *Lawson*. The problem is particularly acute in the First Circuit, where employees of privately held investment advisers and accounting firms today have no hope of protection under Section 1514A.[27] *See* S.Rep. 107-146, p. 19 ("employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law"). Only a clear and certain guarantee of legal protection will overcome the "code of silence" which prompted Congress to enact section 1514A. Especially in these uncertain times, workers want jobs, not the prospect of extended litigation to thrash out whether future judges will find more persuasive the reasoning of the ARB or that of the First Circuit.

---

[27] In addition to Fidelity, mutual funds headquartered in the First Circuit include Columbia Management ($167 billion in assets), John Hancock ($119 billion in assets), MFS Investment Management ($71 billion in assets), and Putnam Investments ($48 billion in assets).

Restoring an environment in which whistleblowing enjoys emphatically unequivocal protection is a matter of national importance. The types of financial misconduct at which section 1514A is directed "can leave thousands of victims robbed of their life savings." (S.Rep. 107-146, pp. 7-8). The cowed silence of a single mutual fund analyst or an accountant auditing a public company could result in the perpetuation of "fraud and other corporate crimes and misdeeds at the ultimate expense of the corporation's shareholders, creditors, and innocent employees.... Ultimately, our nation is the victim as the public loses confidence in the stock market." *SEC v. Gemstar-TV Guide Int'l,* 401 F.3d 1031, 1035-36 (9th Cir. 2005). In 2002 the Senate Judiciary Committee warned

> [t]hat it is likely that there are more "Enrons" lurking out there, simply eluding discovery. Future debacles wait to be discovered not only by investigators or the media, but by the more than one in two Americans who depend on the transparency and integrity of our public markets. The majority of Americans depend on capital markets to invest in the future needs of their families – from their children's college fund to their retirement nest eggs.

(S.Rep. 107-146, p. 11). Subsequent events have made painfully clear the accuracy of that prediction. Certiorari should be granted to end the uncertainty that now exists about the scope and vitality of the protection afforded by section 1514A, so that this critical provision of the Sarbanes-Oxley Act can, as Congress intended, "play a crucial role in restoring trust in the financial markets by ensuring that corporate fraud and greed may be better detected, prevented and prosecuted." (S.Rep. 107-146, p. 2).

In light of the exceptionally thorough legal analysis in the First Circuit and ARB decisions, there is no reason to postpone resolution of this vital question merely to allow the issues to be further aired in the lower courts. These unusual opinions provide a more complete, carefully considered assessment of the question presented than is typically available to the Court from the appellate opinions giving rise to a circuit conflict, even when there is a larger number of such lower court decisions. The detail of the analysis and extensive research in the First Circuit and ARB decisions is exceptional. The four opinions total more than 30,000 words. Those opinions exhaustively parse the wording of section 1514A, canvas the relevant portions of the legislative history of the Sarbanes-Oxley Act, and carefully consider the significance of other federal whistleblower statutes. The ARB opinions add a detailed assessment of the Board's prior section 1514A decisions. All of the opinions draw on the SEC's assessment of the implications of this case for the financial markets and the Department of Labor's evaluation of the realities of the workplace. These opinions provide the Court with a uniquely thorough body of analysis, one which is unlikely to be enhanced if resolution of the question presented is postponed – at considerable risk to investors – to permit additional lower court consideration of the materials already painstakingly presented and analyzed by the First Circuit and the ARB.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

INDIRA TALWANI
SEGAL ROITMAN, LLP
111 Devonshire St.
Fifth Floor
Boston, MA 02109
(617) 742-0208

KEVIN G. POWERS
RODGERS, POWERS & SCHWARTZ, LLP
18 Tremont St.
Boston, MA 02108
(617) 742-7010

Counsel for Petitioners

**Counsel of Record*

United States Court of Appeals
For the First Circuit

No. 10-2240

JACKIE HOSANG LAWSON; JONATHAN M. ZANG,

Plaintiffs, Appellees/Cross-Appellants,

v.

FMR LLC, f/k/a FMR Corp.; FMR CO., INC.; FMR CORP., d/b/a Fidelity Investments; FMR LLC, d/b/a Fidelity Investments; FIDELITY BROKERAGE SERVICES, LLC, d/b/a Fidelity Investments; FIDELITY MANAGEMENT & RESEARCH COMPANY,

Defendants, Appellants/Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

(Hon. Douglas P. Woodlock, *U.S. District Judge*)

Before

Lynch, *Chief Judge*,
Howard and Thompson, *Circuit Judges*.

Paul E. Nemser, with whom Wilfred J. Benoit, Jr., Goodwin Proctor LLP, Eugene Scalia, Jennifer J. Schulp, and Gibson, Dunn & Crutcher LLP were on brief, for appellants/cross-appellees.

Robin S. Conrad, Shane B. Kawka, National Chamber Litigation Center, Inc., Willis J. Goldsmith, Wendy C. Butler, and Jones Day, on brief for Chamber of Commerce of the United States of America, amicus curiae.

Indira Talwani, with whom Segal Roitman, LLP, was on brief, for appellee/cross-appellant Jackie Hosang Lawson.

Jonathan M. Zang pro se.

Mary J. Rieser, Attorney, with whom M. Patricia Smith, Solicitor of Labor, Jennifer S. Brand, Associate Solicitor, and Jonathan T. Rees, Acting Counsel for Whistleblower Programs, were on brief, for the Secretary of Labor as amicus curiae.

Mark D. Cahn, General Counsel, Richard M. Humes, Associate General Counsel, and Thomas J. Karr, Assistant General Counsel, on brief for the Securities and Exchange Commission as amicus curiae.

February 3, 2012

LYNCH, *Chief Judge*. This interlocutory appeal is from the district court's order denying a Rule 12(b)(6) motion to dismiss two separate but related cases under the whistleblower protection provision of section 806 of the Sarbanes-Oxley Act of 2002 (SOX), codified at 18 U.S.C. § 1514A. *See Lawson v. FMR LLC,* 724 F. Supp. 2d 141 (D. Mass. 2010); Fed. R.

Civ. P. 12(b)(6). It raises important questions of first impression.

The plaintiffs, Jackie Hosang Lawson and Jonathan M. Zang, brought separate suits alleging unlawful retaliation by their corporate employers, which are private companies that act under contract as advisers to and managers of mutual funds organized under the Investment Company Act of 1940. Because the two suits shared a common defendant, FMR LLC, and both raised the same question of the scope of employees subject to protection under § 1514A, the district court addressed both cases in a single order. *Lawson,* 724 F. Supp. 2d at 144.

The district court concluded that the whistleblower protection provision within SOX section 806 extends its coverage beyond "employees" of "public" companies (as those terms are defined in the section) to encompass also the employees of private companies that are contractors or subcontractors to those public companies. *Id.* at 163. Concerned that this interpretation could be thought too broad, the district court then imposed a limitation, not found in the text, that the employees must be reporting violations "relating to fraud against shareholders." *Id.* 159-60. We interpret the statute differently and reverse.

I.

Background

Both plaintiffs are suing their former employers, which are private companies that provide advising or management services by contract to the Fidelity family of mutual funds.

The Fidelity mutual funds are not parties in either suit, and are investment companies organized under the Investment Company Act of 1940, 15 U.S.C. § 80a-3(a)(1). They are registered with the Securities and Exchange Commission (SEC) and are required to file reports under section 15(d) of the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. § 78o(d). The mutual funds are owned by their shareholders and are not owned or controlled by, or affiliated with, any of the defendant companies. The Fidelity funds are overseen by a single Fidelity Mutual Fund Board of Trustees; a super-majority of the Board's members are independent of the funds' advisers. As is not unusual among funds organized under the Investment Company Act, the Fidelity funds have no employees of their own.

Plaintiff Zang was employed by Fidelity Management & Research Co. and later by FMR Co., Inc., which was formed as a subsidiary of Fidelity Management & Research Co. (collectively, the Fidelity Management companies). The Fidelity Management companies have entered into contracts with certain of the Fidelity mutual funds to serve as investment advisers or sub-advisers. As investment advisers to the funds, the Fidelity Management companies are subject to the provisions of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.* The Fidelity Management companies are subsidiaries, directly or indirectly, of FMR LLC.

Zang's employment was terminated in July 2005. On September 15, 2005, he filed a complaint with the Occupational Health & Safety Administration (OSHA) of the Department of Labor (DOL), based on 18 U.S.C. § 1514A(b)(1)(A), which allows a person who alleges discharge or discrimination in violation of § 1514A(a) to seek relief by filing a complaint with the Secretary of Labor. The Secretary has, in turn, delegated enforcement responsibility for § 1514A to the Assistant Secretary for Occupational Safety and Health. *See* 67 Fed. Reg. 65,008, 65,008 (Oct. 22, 2002). Zang alleged that he had been terminated by the Fidelity Management companies in retaliation for raising concerns about inaccuracies in a draft revised registration statement for certain Fidelity funds. Zang alleged that he reasonably believed these inaccuracies violated several federal securities laws.

OSHA dismissed Zang's complaint, finding that he was a covered employee within the meaning of § 1514A(a), that is, he was an employee "covered" by the whistleblower protections, but that he had not engaged in conduct protected by that subsection. Zang objected and had a hearing before an Administrative Law Judge (ALJ). The Fidelity Management companies moved for summary decision, contending, among other things, that Zang was not a covered employee. After allowing limited discovery on the issue, the ALJ granted summary decision for the Fidelity Management companies on that basis and dismissed. *Zang v. Fid. Mgmt. & Research Co.,* No. 2007-SOX-00027, 2008 WL 7835900 (Dep't of Labor ALJ Mar. 27, 2008).

Interpreting § 1514A(a), the ALJ concluded that merely being an employee of a privately held contractor to a fund was insufficient to come within the term "employee."[1]

Zang petitioned for review of the ALJ decision by the DOL's Administrative Review Board (ARB).[2] Zang

---

[1] The ALJ also concluded that Zang would only be a covered employee if the private Fidelity Management companies acted on behalf of the public Fidelity funds as contractors or subcontractors "in employment matters . . . when [they] terminated [Zang's] employment." *Zang v. Fid. Mgmt. & Research Co.,* No. 2007-SOX-00027, 2008 WL 7835900, at *14 (Dep't of Labor ALJ Mar. 27, 2008). The ALJ concluded that the funds had no role in the Fidelity Management companies' employment decisions and Zang had not sufficiently alleged that the private Fidelity Management companies had acted as the funds' "agent or contractor in regard to employment matters" and dismissed his complaint. *Id.* at *18. That issue is not before us.

Zang also argued before the ALJ that the private Fidelity Management companies and the public Fidelity funds should be considered a "single integrated enterprise" for the purpose of evaluating whether he was a covered employee under § 1514A(a). *Zang,* 2008 WL 7835900, at *15. The ALJ rejected this argument, *id.* at *18, and that issue is also not before us.

[2] The Secretary of Labor has delegated review of decisions by DOL ALJs to the DOL's ARB. *See* 67 Fed. Reg. 64,272, 64,272-73 (Oct. 17, 2002).

then gave notice to the DOL of his intention to file an action in federal court and filed his complaint against the Fidelity Management companies in the district court, terminating his appeal with the ARB. Under SOX, a claimant may seek de novo review in federal district court if the DOL has not issued a final decision on a complaint within 180 days of its filing.[3] 18 U.S.C. § 1514A(b)(1)(B).

Plaintiff Lawson was employed by Fidelity Brokerage Services, LLC, a private subsidiary of FMR Corp., which was succeeded by FMR LLC. Together these companies operate under the trade name Fidelity Investments. Lawson filed SOX complaints against her employer and its parent with OSHA pursuant to § 1514A(b)(1)(A) in 2006 while she was still employed. She alleged retaliation against her for raising concerns primarily relating to cost accounting methodologies. She resigned her employment in September 2007, claiming that she had been constructively discharged. One year after filing, Lawson notified OSHA that she intended to seek review of her SOX claim in federal court. Her claims, which had been consolidated, were closed by the DOL, and she

---

[3] The district court determined that although there was an ALJ decision in Zang's case, because that decision was on review with the ARB, it was not final. *Lawson v. FMR LLC,* 724 F. Supp. 2d 141, 151 (D. Mass. 2010). And since more than 180 days had elapsed since his claim was filed with OSHA, his complaint was properly before the district court. *Id.* at 152. That portion of the district court's opinion is not an issue on appeal.

filed a complaint against her employers in the district court.

The defendants, all private companies, filed motions to dismiss under Rule 12(b)(6), arguing that the plaintiffs were not covered employees under § 1514A(a) and, in the alternative, that they had not engaged in protected activity under § 1514A(a)(1). The district court denied the motions to dismiss as to the plaintiffs' claims alleging retaliation in violation of § 1514A, which is the subject of this appeal.[4] *Lawson,* 724 F. Supp. 2d 141.

The district court held that the SOX whistleblower protection provisions of § 1514A(a) extend to employees of private agents, contractors, and subcontractors to public companies; that the plaintiffs had sufficiently pleaded facts alleging that their private company employers were "either contractors, subcontractors, or agents of publicly held investment companies;" and that both plaintiffs had sufficiently alleged that they had engaged in protected activity under § 1514A(a)(1). *Lawson,* 724 F. Supp. 2d at 163-65.

The defendants moved that the dispositive issue of § 1514A(a)'s applicability to the plaintiffs be certified for interlocutory appeal under 28 U.S.C.

[4] The district court granted the motions to dismiss as to the plaintiffs' state law claims for wrongful discharge in violation of public policy. *Lawson,* 724 F. Supp. 2d at 167. The dismissal of those claims is not a subject of this appeal.

§ 1292(b). The district court granted the motion, certified a "controlling question of law" to this court, and stayed the cases before it. *Lawson v. FMR LLC,* 724 F. Supp. 2d. 167, 169 (D. Mass. 2010). The defendants petitioned this court for interlocutory review, and the plaintiffs each filed cross-petitions urging this court to grant the appeal. We granted the parties' cross-petitions for interlocutory review. *Lawson v. FMR LLC,* No. 10-1944 (1st Cir. Oct. 25, 2010).

II.

Statutory Construction

We limit our review of the district court's order to the question the court certified:

> Does the whistleblower protection afforded by Section 806(a) of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, apply to an employee of a contractor or subcontractor of a public company, when that employee reports activity which he or she reasonably believes may constitute a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348; any rule or regulation of the Securities and Exchange Commission; or any provision of Federal law and such a violation would relate to fraud against shareholders of the public company?

Lawson, 724 F. Supp. 2d at 169; *see also* 28 U.S.C. § 1292(b).[5]

Our review is de novo, both because this is an appeal from a denial of a Rule 12(b)(6) motion and because the issue of statutory interpretation is one of law. *See U.S. ex rel. Hutcheson v. Blackstone Med., Inc.,* 647 F.3d 377, 383 (1st Cir. 2011); *Carnero v. Bos. Scientific Corp.,* 433 F.3d 1, 4 (1st Cir. 2006).

A. Construction of the statute

1. Text of § 1514A(a)

This case turns on the interpretation of SOX's whistleblower protection provision, codified at 18 U.S.C. § 1514A. It "is a relatively small part of the Sarbanes-Oxley Act which is composed of many separate statutes and statutory schemes aimed at achieving the Act's investor-protection goals." *Carnero,* 433 F.3d at 5.

We start our analysis with the particular subsection at issue before considering other relevant text in

[5] Although the Supreme Court has held that under 28 U.S.C. § 1292(b), "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court," *Yamaha Motor Corp., U.S.A. v. Calhoun,* 516 U.S. 199, 205 (1996), we need not exercise our power to go beyond the question certified, and do not do so here. *See* 16 Wright & Miller, *Federal Practice and Procedure* § 3929 (2d ed. 2011) ("Of course this power need not be exercised – ordinarily the question specified by the district court . . . will be the focus of arguments on the merits.").

the statute, both in the section and elsewhere. Section 806 of SOX reads in pertinent part:

> SEC. 806. PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES WHO PROVIDE EVIDENCE OF FRAUD.
>
> (a) In General. – Chapter 73 of title 18, United States Code, is amended by inserting after section 1514 the following:
>
> "§ 1514A. Civil action to protect against retaliation in fraud cases
>
> "(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. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), 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 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities or commodities fraud], 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

"(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."

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802-03 (emphasis added).[6] The

---

[6] Section 1514A(a) has since been amended by Congress. This is the unamended text in force at all pertinent times here.

interpretation of the emphasized language in the text of subsection (a) is in dispute.

The parties agree only that this provision extends whistleblower protection to employees of "public companies" – that is, those with a class of securities registered under section 12 of the 1934 Act or those that file reports with the SEC pursuant to section 15(d) of the 1934 Act. While literally one of these two categories encompasses companies with publicly traded stock, we use the term "public companies" as a shorthand for both categories because companies required to file reports with the SEC pursuant to section 15(d), such as the Fidelity mutual funds, are "public" in the sense that they have issued securities that may be sold to the public and are required to make periodic reports to their investors. The question is whether Congress intended the whistleblower provisions of § 1514A also to apply to those who are employees of a contractor or subcontractor to a public company and who engage in protected activity.[7]

[7] As the case comes to us, the plaintiffs' employers are not acting as agents for employment purposes of the Fidelity mutual funds, which are public companies but have no employees. Their employers' contracts with those funds are not for employment purposes.

Some opinions by the DOL ARB and by DOL ALJs have indicated that an employee of a non-public company may be able to proceed against his or her employer under § 1514A where such a non-public employer is a contractor, subcontractor, or agent to a public company for employment purposes – that is,

(Continued on following page)

No court of appeals has ruled on this issue.[8]

where the non-public company retaliates against its own employee at the public company's behest. *See Klopfenstein v. PCC Flow Techs. Holdings, Inc.,* No. 04-149, 2006 WL 3246904, at *10 (Dep't of Labor ARB May 31, 2006); *Zang,* 2008 WL 7835900, at *14; *but see Johnson v. Siemens Bldg. Techs., Inc.,* No. 08-032, 2011 WL 1247202, at *12 (Dep't of Labor ARB Mar. 31, 2011) (stating that *Klopfenstein* should be read as stating the broader proposition that a private company can be held liable under § 1514A where such private company would be considered a public company's agent under common law agency principles, not only when the private company is the public company's agent for employment purposes).

Again, neither plaintiff argues before us that we are faced with a situation where a private company acts as a contractor, subcontractor, or agent of a public company *for employment purposes* and retaliates against its own employee at the direction of the public company. We express no opinion on the scope of § 1514A(a)'s coverage in such a situation.

[8] In *Carnero v. Bos. Scientific Corp.,* 433 F.3d 1 (1st Cir. 2006), we held that § 1514A did not have extraterritorial effect. In order to reach the question of extraterritoriality, we "assume[d], for present purposes, but without deciding" that the plaintiff in that case was a covered employee of the public company Boston Scientific Corporation (BSC), even though he was employed by BSC's foreign subsidiaries. *Id.* at 6. However, we also stated that "[n]either party . . . contest[ed] that [the plaintiff] was a covered employee of BSC for purposes of seeking whistleblower relief under" SOX; instead they focused all of their arguments on the extraterritorial reach of section 806. *Id.* The issue of whether § 1514A(a) covers employees of companies which are under contract to public companies was not presented to us in *Carnero.*

The only other reported district court opinion addressing this question rejected the argument accepted by the district court here. In *Brady v. Calyon Sec. (USA),* 406 F. Supp. 2d 307 (S.D.N.Y. 2005), the court concluded that the reference to "any

(Continued on following page)

The defendants argue that § 1514A(a) provides that no public company – or any officer, employee, contractor, subcontractor, or agent of that company – may discriminate against an employee *of such public company* for engaging in protected whistleblowing activity. The defendants read the listing of "officer, employee, contractor, subcontractor, or agent" in § 1514A(a) as identifying who is barred from taking retaliatory action against the employees of public companies, but not as extending coverage to those enumerated entities' own employees.

The plaintiffs contend that the covered "employee" who is given whistleblower protection includes both the employees of public companies *and* those who are the employees of those public companies' officers, employees, contractors, subcontractors, or agents.

While different readings may be given the term "employee" within the emphasized language of the text of § 1514A(a) itself as to whether the protected employee refers only to employees of the public

---

officer, employee, contractor, subcontractor, or agent of such company" in § 1514A(a) "simply lists the various potential actors who are prohibited from engaging in discrimination on behalf of a covered employer." *Id.* (quoting *Minkina v. Affiliated Physicians Grp.,* No. 2005-SOX-00019, 2005 WL 4889024, at *5 (Dep't of Labor ALJ Feb. 22, 2005)) (internal quotation marks omitted).

Two unreported district court cases have also addressed the question. *See Ervin v. Nashville Peace & Justice Ctr.,* No. 07-0832, 2008 WL 4449920, at *7 (M.D. Tenn. Sept. 29, 2008); *Rao v. Daimler Chrysler Corp.,* No. 06-13723, 2007 WL 1424220, at *3 (E.D. Mich. May 14, 2007).

companies, principles of statutory interpretation lead us to interpret § 1514A(a) in favor of such a limitation. The title of section 806 and the caption of § 1514A(a) are statements of congressional intent which go against plaintiffs' interpretation. Other provisions of SOX also support and are more consistent with the defendants' reading and inconsistent with the plaintiffs' reading. Our reading of "employee" as excluding from coverage employees of officers, employees, contractors, subcontractors, and agents of public companies is also strongly confirmed by the pre-passage legislative history of this section and other sections of SOX and the purpose of the legislation. Further confirmation is provided by the later actions of Congress in rejecting a bill meant to amend SOX and in congressional acceptance of other amendments.

That the immediate text within § 1514A(a) may be read differently as to the scope of the protected "employees" as a matter of grammar needs little discussion. In our view, the more natural reading is the one advanced by the defendants. Each side has an argument that had Congress just added a few words, its intent would have been clearer,[9] and none of these

---

[9] For instance, Congress could have more clearly enacted defendants' interpretation of § 1514A(a) by extending the provision's coverage only to "an employee *of such company.*" Or Congress could have clearly enacted the plaintiffs' interpretation by defining "employee" or explicitly adding coverage of employees of advisers to investment companies organized under the Investment Company Act of 1940.

arguments resolve the case. That intent does become clearer if one looks beyond the immediate phrases in subsection (a). Both circuit precedent and Supreme Court precedent require that we examine the broader statutory framework, including particularly the nearby language, *Comm'r v. Lundy,* 516 U.S. 235, 250 (1996); *United States v. Ozuna-Cabrera,* 663 F.3d 496, 499 (1st Cir. 2011), and the title and caption, *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.,* 331 U.S. 519, 529 (1947); *Berniger v. Meadow Green-Wildcat Corp.,* 945 F.2d 4, 9 (1st Cir. 1991).

We conclude that only the employees of the defined public companies are covered by these whistleblower provisions; the clause "officer, employee, contractor, subcontractor, or agent of such company" goes to who is prohibited from retaliating or discriminating, not to who is a covered employee and so does not violate the rule against rendering superfluous any statutory language. The text of § 1514A(a) first identifies covered employers: those with a class of securities registered under section 12 of the 1934 Act or those that file reports with the SEC pursuant to section 15(d) of the 1934 Act. Such public companies may not retaliate[10] against their own employees who engage in protected activity. Section 1514A(a) then enumerates a list of representatives of such employers,

---

[10] We use the term "retaliate" to cover "discharge, demote, suspend, threaten, harass, or in any other manner discriminate . . . in the terms and conditions of employment." 18 U.S.C. § 1514A(a).

including those who are contractors or subcontractors, and they are also barred from retaliating against employees of the covered public-company employer who engage in protected activity.

The plaintiffs and their amici argue that, because § 1514A(a) forbids retaliation *by* "any officer, employee, contractor, subcontractor, or agent" of a public company, that provision must forbid retaliation *against* an employee of a contractor, subcontractor, or agent to a public company. But plaintiff Lawson and plaintiffs' amici also reject the district court's limiting principle for their broad reading. As a matter of logic, the conclusion does not follow from its premise. As a matter of language, the argument ignores its implication: if an employee of "any" contractor, subcontractor, or agent is protected, Congress must, by the same reasoning, have intended to protect the employee of "any" officer or employee of a public company. This argument both creates anomalies and provides very broad coverage.

Section 1514A(a)'s list of company representatives serves, instead, to ensure an employee of a public company is covered under the provision if he or she were harassed by officers, other employees, or contractors or subcontractors to the public company for reporting fraud in that public company.[11]

---

[11] As said, our interpretation does not render the listing clause superfluous but gives it meaning.

(Continued on following page)

2. <u>The title of section 806 and the caption of § 1514A(a)</u>

Both the title of SOX section 806, within which § 1514A(a) is housed, and the caption of § 1514A(a) itself are explicit guides to the limits on the meaning of the textual phrase within § 1514A(a). Section 806 states it concerns "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud." From that alone, it would be odd to read § 1514A(a) as covering employees of private companies. It is unlikely Congress intended the term "Civil action to protect against retaliation in fraud cases" in the heading of § 1514A to be broader than the terms of the "Protection" discussed in the title of section 806.

One of our sister circuits has, in addition, hypothesized a particular fact situation. In *Fleszar v. U.S. Dep't of Labor,* 598 F.3d 912 (7th Cir. 2010), *cert. denied,* 131 S. Ct. 423 (2010), Judge Easterbrook observed, in dicta, that "[t]he idea behind" the provision listing contractors, subcontractors, and agents in § 1514A(a) as entities *by* whom retaliation cannot take place "is that a covered firm, such as IBM, can't retaliate against whistleblowers by contracting with an ax-wielding specialist (such as the character George Clooney played in 'Up in the Air')." *Id.* at 915; *see also Kalkunte v. DVI Fin. Servs., Inc.,* No. 2004-SOX-00056, 2005 WL 4889006 (Dep't of Labor ALJ July 18, 2005), *aff'd,* Nos. 05-139, 05-140, 2009 WL 564738 (Dep't of Labor ARB Feb. 27, 2009) (holding that the complaining employee of a public company could bring a § 1514A action against such company's private contractor where the contractor managed the public company's operations and retaliated against the complainant). We merely note this and have no need to comment further.

Congress did not rest there. It repeated the limitation "Whistleblower protection for employees of publicly traded companies" in the caption in the first line of the text of subpart (a) of § 1514A. This double limitation strongly works against plaintiffs' interpretation.

Supreme Court, as well as circuit, law requires that we consider the title and the caption of the section under which the language appears. *See Bhd. of R.R. Trainmen,* 331 U.S. at 529; *Ozuna-Cabrera,* 663 F.3d at 499 n.3; *Berniger,* 945 F.2d at 9. It is certainly true that "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen,* 331 U.S. at 528-29. This is not our issue: the caption of § 1514A(a) does not in any way contradict the plain text, but sheds light on the meaning of the text. The Supreme Court has been clear that titles and captions should be used "[f]or interpretive purposes . . . when they shed light on some ambiguous word or phrase." *Id.* at 529; *see also Berniger,* 945 F.2d at 9 ("It is well established that a statute's title may aid in construing any ambiguities in a statute."). The title and the caption each contain the phrase, "employees of publicly traded companies," which supports the reading that the use of the term "employees" underneath refers to "employees of publicly traded companies."

The Supreme Court has addressed a case presenting a similar question to the one here. *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.* (*NCIR*), 502 U.S. 183 (1991). At issue was a regulation entitled

"Condition against unauthorized employment," the text of which referred to "[a] condition barring employment." 8 C.F.R. § 103.6(a)(2)(ii) (1991). The parties disagreed whether the word "employment" in the text referred to employment generally or more narrowly to unauthorized employment. *NCIR,* 502 U.S. at 189. The Court ruled that "[t]he text's generic reference to 'employment' should be read as a reference to the '*unauthorized* employment' identified in the paragraph's title." *Id.* We follow the same reasoning as to § 1514A(a): the "generic reference" to "employee" in the text "should be read as a reference to" the "employees of publicly traded companies" identified in that subsection's caption.[12]

Plaintiffs' fallback is to their argument that the title and the caption do not mean what they say. Just as the term "publicly traded companies" is a shorthand for the two categories of covered companies,

---

[12] Our reading is entirely consistent with the principles of construction applied and the result reached in *United States v. Ozuna-Cabrera,* 663 F.3d 496 (1st Cir. 2011). There we rejected an argument that the text "without lawful authority" in 18 U.S.C. § 1028A(a)(1) was equivalent to "without authorized permission" and that the defendant's construction was somehow supported by the statute's title: "Aggravated identity theft." In *Ozuna-Cabrera,* the title was entirely consistent with our rejection of the defendant's more defendant-friendly construction. In this case, the title and caption are even clearer in support of our reading. Further, the text we considered in *Ozuna-Cabrera* provided no ambiguity which would have warranted resort to the rule of lenity, which is used only in criminal cases.

plaintiffs argue that the title and caption are no more than a second shorthand meant to include all employees possibly covered in the text. That is not the proper reading, and is contradicted by the plain words of the title of section 806 and the caption of § 1514A(a). The title and caption are not ambiguous and their purpose in being there was not to add to any ambiguity in the text but to clarify. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.,* 128 S. Ct. 2326, 2336 (2008) (relying on subchapter's title – "Postconfirmation matters" – to undermine respondent's argument that a statute within that subchapter covered preconfirmation transfers); *Almendarez-Torres v. United States,* 523 U.S. 224, 234 (1998) (title of amendment, reinforced by its legislative history, clarified amendment's meaning). We do not think there is any ambiguity left. But if there were, other rules of statutory interpretation would lead us to the same result.

3. Other textual provisions of SOX

The choice by Congress to provide limited coverage in § 1514A(a) was not inadvertent, as shown by its choices elsewhere in SOX. Other provisions of SOX as of the time of enactment reinforce our view of the meaning of § 1514A(a) in several respects. Congress enacted only limited whistleblower protection in § 1514A(a). Where it wished to enact broader whistleblower protection elsewhere, it explicitly did so. But it chose different, more limited language for the coverage provision of § 1514A(a) than when it intended expanded coverage.

Congress also was explicit elsewhere than in its choice of language in § 1514A(a); where it intended to regulate non-public entities, it did not use language equivalent to the text of § 1514A(a). It is also clear that Congress made choices about different regulatory mechanisms for different entities, and intended the coverage of § 1514A(a), which creates a private right of action, not to be so broad as to include employees of non-public companies. For example, it subjected accountants and lawyers to different regulatory mechanisms.

First, when Congress intended to enact broader whistleblower protection in SOX itself in sections other than § 1514A, it did so clearly. In *Carnero,* we described section 1107 of SOX as "[t]he other whistleblower provision found in [SOX]." 433 F.3d at 10; *see also Glynn v. EDO Corp.,* 536 F. Supp. 2d 595, 616 (D. Md. 2008) (describing section 1107 as serving to "deter[ ] retaliation against whistleblowers"). Section 1107 is entitled "Retaliation Against Informants" and adds this language to 18 U.S.C. § 1513:

> (e) *Whoever* knowingly, with the intent to retaliate, *takes any action harmful to any person, including interference with the lawful employment or livelihood of any person,* for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal

> offense, shall be fined under this title or imprisoned not more than 10 years, or both.

SOX § 1107, 116 Stat. at 810 (emphasis added). This language requires neither a public company, nor an employment relationship, nor a securities law violation to trigger coverage. The scope of § 1514A(a) is, by contrast, conspicuously narrow. *See Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438, 452 (2002) ("[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. United States,* 464 U.S. 16, 23 (1983))).

Second, in other portions of SOX, where Congress intended separate provisions of the Act to apply to employees of private entities, it said so explicitly. By contrast, the title of section 806 and the caption of § 1514A(a) explicitly refer to publicly traded companies. SOX contains a number of provisions, described below, which directly and explicitly regulate the activities of entities other than publicly traded companies. Further, Congress expressly set up different regulatory schemes, which varied with the persons or entities involved. For example, Title I of SOX establishes the Public Company Accounting Oversight Board, which regulates "public accounting firms that prepare audit reports for issuers, brokers, and dealers." 15 U.S.C. § 7211(c)(1); *see also id.* §§ 7211-7220. Title II ensures the independence of outside auditors. *See id.* §§ 7231-7234.

In another example, section 307 of SOX directs the SEC to issue rules governing the professional conduct of attorneys – both in-house and outside counsel – who appear before it in the representation of issuers. *See id.* § 7245. Moreover, Title VI, "Commission Resources and Authority," details the SEC's authority to censure or bar outside securities professionals from practice and defines conditions under which a person can be barred from practicing as a broker, investment adviser, or dealer. *See id.* §§ 78d-3, 78o, 80b-3.

Further, Title V, "Analyst Conflicts of Interest," defines codes of conduct for outside securities analysts and requires disclosures of conflicts of interest. *See id.* § 78o-6. And Title VII, "Studies and Reports," requires the Comptroller General and the SEC to perform various studies, including on securities violations by securities professionals, defined as "public accountants, public accounting firms, investment bankers, investment advisers, brokers, dealers, attorneys, and other securities professionals practicing before the Commission." SOX § 703(a)(1), 116 Stat. at 798.

Congress has been clear in SOX when it intends to regulate private entities and has been explicit. By contrast, the limited language within the text of § 1514A(a) and the title and caption show that Congress did not intend coverage to reach beyond employees of public companies. The Supreme Court has directed us to be particularly attentive to such language choices in interpreting the securities laws. *See*

Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 176 (1994) (refusing to impose aiding and abetting liability under § 10(b) of the 1934 Act because "Congress knew how to impose aiding and abetting liability when it chose to do so"); *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 734 (1975) (limiting Rule 10b-5 cause of action to actual purchasers and sellers of securities in part because "[w]hen Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly"); *SEC v. Tambone,* 597 F.3d 436, 444-45 (1st Cir. 2010) (en banc) (court must honor the differential draftsmanship of Congress).

Plaintiffs argue that surely Congress meant to cover all whistleblowers and their reading is required by Congress's purpose. Not so. These distinctions and differentiated approaches to multi-faceted problems drawn by Congress, including the coverage limitation in § 1514A(a) to public companies, are consistent with the problems which led to the enactment of SOX. Congress's primary concern in enacting SOX was not the activities of the advisers to mutual funds organized under the Investment Company Act, like the Fidelity funds here. Indeed, Congress knew that investment companies like the Fidelity mutual funds often do not have their own employees, but only a Board of Trustees, and are often advised and managed by private entities, like the defendants. *See Jones v. Harris Assocs. L.P.,* 130 S. Ct. 1418, 1422 (2010) ("A separate entity called an investment adviser creates the mutual fund, which may have no employees of its own."); *Burks v. Lasker,* 441 U.S. 471, 480-81 (1979); S. Rep. No. 91-184, at 4 (1969) (accompanying the Investment Company Amendments Act of 1970) ("Mutual funds, with rare exception, are not operated by their own employees. Most funds are formed, sold, and managed by external organizations, [called 'investment advisers,'] that are separately owned and operated."). And if they have no employees, they are not subject to § 1514A. This is not anomalous. Congress in the Investment Company Act deliberately created this separation between investment companies and their advisers.[13] *See* 15 U.S.C. § 80a-1(b)(2) (declaring as a policy rationale for the Investment Company Act the prevention of conflicts of interest between investment companies and advisers).

---

[13] Investment advisers and their employees are regulated by the securities laws, and they may be prosecuted for violations of these laws. *See* 15 U.S.C. § 80b-6 (making it unlawful for investment advisers to, among other things, defraud their clients or prospective clients). In fact, the SEC's study of violations of securities laws by securities professionals required by SOX section 703 demonstrates that the SEC has been active in prosecuting violations of securities laws by investment advisers. *See* SEC, Study and Report on Violations by Securities Professionals 6 (2003), *available at* http://www.sec.gov/news/studies/sox703 report.pdf/ (finding that in SEC actions that reached finality between January 1, 1998, and December 31, 2001, 264 investment advisers or persons associated with investment advisers had been found to have violated securities laws).

Had Congress intended to extend § 1514A whistleblower coverage protections to the employees of private companies that have contracts to provide investment advice to funds organized under the Investment Company Act, it would have done so explicitly in § 1514A(a) not only in the text of § 1514A(a), but also in the title and caption under which the text is found. Elsewhere in SOX, Congress did specifically address investment companies and investment advisers, and made it explicit when it intended coverage and when it did not. *See, e.g.,* 15 U.S.C. § 7263 (exempting "investment compan[ies] registered under" section 8 of the Investment Company Act from certain SOX provisions); *id.* § 80b-3(e) (titled "Investment Advisers" and amending the Investment Advisers Act).

The broader reading of § 1514A(a) offered by plaintiffs would provide an impermissible end run around Congress's choice to limit whistleblower protection in that subsection to the employees of two categories of companies the title and caption call "publicly traded companies."

4. <u>SOX's reference to the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century</u>

The whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121, was a model for at least portions of the whistleblower protection provision of § 1514A, which incorporates the procedures and burden-shifting framework of AIR 21. *See* 18 U.S.C. § 1514A(b)(2)(A) ("An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code."); *id.* § 1514A(b)(2)(C) ("An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.").

The legislative history of SOX also refers to AIR 21. *See* S. Rep. No. 107-146, at 30 (2002) (additional views of Sen. Hatch, et al.) (stating that an amendment to the bill containing eventual § 1514A made that provision "consistent with [AIR 21] in which we provided whistleblower protections to another class of non-government employees[;] . . . we thought it best to track those protections as closely as possible"). The tracking of these protections operates against plaintiffs' interpretation.

The pertinent section of AIR 21 is entitled "Protection of employees providing air safety information" and states that "[n]o air carrier or *contractor* or *subcontractor* of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)" engaged in protected whistleblowing activity. 49 U.S.C. § 42121(a) (emphasis added).[14]

There are several important differences between the whistleblower provision of AIR 21 and that of SOX, which operate against plaintiffs' interpretation. The text of AIR 21 has greater clarity. Further, AIR 21 contains an inherent, textual limiting principle. It does not extend broadly to any contractor or subcontractor, instead § 42121 defines "contractor" to mean "a company that performs safety-sensitive functions by contract for an air carrier." *Id.* § 42121(e). This limitation on the term "contractor" excludes from coverage employees of all other contractors and subcontractors.

By contrast, plaintiffs' broader and unlimited construction of "employee" in § 1514A(a) would provide protection to employees of *any* contractor or subcontractor. It is true that AIR 21 explicitly went beyond employees of airlines, but only to employees of a limited class of contractors and subcontractors: those who perform "safety-sensitive functions." That limited expansion serves AIR 21's purpose of protecting the safety of travelers by focusing on those contractors and subcontractors responsible for safety. No such limitation is built into SOX or into plaintiffs'

---

[14] *See* S. Rep. No. 105-278, at 22 (1998) (stating that the whistleblower protection of AIR 21 "would provide employees of airlines, and employees of airline contractors and subcontractors, with statutory whistleblower protection").

expansive reading. Defendants' reading, by contrast, is self-limited.

Second, the text of AIR 21 does not pose the interpretative problems posed by plaintiffs' proposed construction of § 1514A(a): excessive breadth and the extension of coverage to employees of employees and employees of officers. In § 1514A(a), Congress chose to employ different language from what it used in § 42121(a), undercutting plaintiffs' argument that because AIR 21 purportedly covers employees of contractors, so should § 1514A.

Further, in AIR 21, Congress did not consider the subject matter of the complaints – air safety information – to be an adequate limitation on the creation of whistleblower liability in the air carrier business, so it limited the definition of the relevant contractors. Congress did not in SOX consider the subject matter of the complaints to be the only limiting principle, nor to be sufficient in itself to narrow the range of contractors. The plaintiffs' reading is broader than Congress's intended reach.[15]

[15] Because we conclude that the text of § 1514A(a) is unambiguous in limiting whistleblower protection to employees of public companies and reverse the district court, we do not reach a conclusion on the district court's proposed limiting principle. The district court stated that the phrase "relating to fraud against shareholders" in § 1514A(a)(1) modifies the entire clause "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". *See Lawson,* 724 F. Supp. 2d at

(Continued on following page)

5. <u>Contrast with language of other whistle-blower protection statutes</u>

Our reading of § 1514A(a) stands on the text of SOX itself. If more were needed, we also find support in the contrast with whistleblower provisions in other statutes. In contrast with the language of § 1514A(a), we note two other, earlier, federal whistleblower protection statutes which explicitly extend coverage to employees of contractors to the entities regulated by those statutes. That Congress was clear in extending coverage to employees of contractors in those statutes confirms our understanding of § 1514A(a) as not extending so far.

The Nuclear Whistleblower Protection provision of the Energy Reorganization Act, 42 U.S.C. § 5851(a)(1), states that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)" engaged in protected whistle-blowing activity. The provision defines "employer" as, among other things, "a licensee of the [Nuclear Regulatory] Commission or of an agreement State under" the Atomic Energy Act of 1954, *id.* § 5851(a)(2)(A), "a contractor or subcontractor of such a licensee or applicant" for a license, *id.* § 5851(a)(2)(C), and "a

159-60. That proposed limiting principle addresses the scope of protected activity, not the scope of employee coverage.

contractor or subcontractor of the Commission," *id.* § 5851(a)(2)(E).

Similarly, the whistleblower protection provision of the Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129(a)(1), states that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)" engaged in protected whistleblowing activity. That statute goes on to define "employer" as "a person owning or operating a pipeline facility," *id.* § 60129(a)(2)(A), or "a contractor or subcontractor of such a person," *id.* § 60129(a)(2)(B).

The whistleblower protection provisions of both the Energy Reorganization Act and the Pipeline Safety Improvement Act are explicit in defining which entities and which of those entities' representatives are covered employers. We view the fact that Congress was not similarly explicit in extending coverage to the employees of contractors, subcontractors, and agents in § 1514A(a) as evidence that Congress did not intend such coverage to exist.

6. <u>Other canons of construction</u>

Our reading of § 1514A is further confirmed by canons of construction mandated by Supreme Court opinions regarding both securities laws and the relationship between investment companies and their advisers.

The Court has admonished the lower federal courts not to give securities laws a scope greater than that allowed by their text. *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,* 128 S. Ct. 761, 772 (2008) ("[T]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation." (quoting *Am. Fire & Cas. Co. v. Finn,* 341 U.S. 6, 17 (1951))); *Pinter v. Dahl,* 486 U.S. 622, 653 (1988) ("The ascertainment of congressional intent with respect to the scope of liability created by a particular section of the Securities Act must rest primarily on the language of that section."). While many of these cases are in the context of the implied private right of action under § 10(b) of the 1934 Act, the rule that we are to "assume that Congress meant what it said" when it enacts legislation applies throughout the Code, including SOX. *Pinter,* 486 U.S. at 653.

Plaintiffs incorrectly argue that since the statute has some remedial purposes, those purposes must be as broad as plaintiffs say, and it must be assumed Congress chose the mechanism of a broad private right of action rather than other mechanisms to effectuate remedies. Plaintiffs essentially argue that the actual text must give way in favor of a broader reading to effectuate those broad remedial purposes. That is not the law. While the Court has stated that "securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes,'" *Herman & MacLean v. Huddleston,* 459 U.S. 375, 386-87 (1983) (quoting *SEC v. Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 195 (1963)), it has also admonished that "[t]he broad remedial goals of [a securities law] are insufficient justification for interpreting a specific provision 'more broadly than its language and the statutory scheme reasonably permit.'" *Pinter,* 486 U.S. at 653 (quoting *Touche Ross & Co. v. Redington,* 442 U.S. 560, 578 (1979)). Here, plaintiffs' reading is broader than the statutory scheme permits. Further, as discussed later, plaintiffs' interpretation goes far beyond the problems Congress wished to remedy.

In *Janus Capital Group, Inc. v. First Derivative Traders,* 131 S. Ct. 2296 (2011), the Court held that the fact that an investment adviser to a mutual fund exercised significant influence over its client fund and prepared SEC prospectuses on behalf of the fund did not make the adviser subject to liability under SEC Rule 10b-5 for statements made in those prospectuses, despite the adviser's "uniquely close" relationship with the fund. The Court stated that the mutual fund (an investment company under the Investment Company Act of 1940) and the adviser (an investment adviser under the Investment Adviser Act of 1940) were "legally separate entities" and that "[a]ny reapportionment of liability in the securities industry in light of the close relationship between investment advisers and mutual funds is properly the responsibility of Congress and not the courts." *Id.* at 2304.

Although there is a close relationship between the private investment adviser defendants and their client mutual funds, as pointed out by the plaintiffs and the SEC as amicus curiae, the two entities are separate because Congress wanted it that way. Had Congress intended to ignore that separation and cover the employees of private investment advisers for whistleblower protections, it would have done so explicitly in § 1514A(a). However, it did not.

Finally, the rule of lenity has no place in our interpretation of § 1514A(a), for several reasons. Application of the rule of lenity is restricted to the interpretation of criminal statutes. *Bifulco v. United States,* 447 U.S. 381, 387 (1980) (The rule of lenity "applies . . . to interpretations of the substantive ambit of criminal prohibitions [and] . . . to the penalties they impose."). Section 1514A is not a criminal provision and imposes no criminal penalties; instead it provides for compensatory civil damages. 18 U.S.C. § 1514A(c). In addition to the inapplicability of the rule of lenity vel non, it would not apply here in any event because there is simply the lack of "grievous ambiguity" left after considering the text, structure, history, and purpose needed to invoke the rule. As the Supreme Court has recognized, "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended."[16] *Barber v. Thomas,* 130 S. Ct. 2499, 2508-09

[16] Furthermore, interpretative principles applied to immigration cases have no application here. *Cf. INS v. St. Cyr,* 533 U.S. 289, 320 (2001) (reciting "the longstanding principle of

(Continued on following page)

(2010) (citation omitted) (quoting *Muscarello v. United States,* 524 U.S. 125, 139 (1998), and *Bifulco,* 447 U.S. at 387) (internal quotation marks omitted) (quoted in *United States v. Gerhard,* 615 F.3d 7, 22 (1st Cir. 2010)).

B. Legislative history

Turning from the statutory language and principles of statutory interpretation which alone require us to reject plaintiffs' interpretation, we also confirm our understanding of the text by examining the legislative history. *See Samantar v. Yousuf,* 130 S. Ct. 2278, 2287 & n.9 (2010) (using legislative history to confirm the Court's sense of a statute's plain meaning); *Phillips v. Pembroke Real Estate, Inc.* 459 F.3d 128, 143 n.12 (1st Cir. 2006).

1. Contemporaneous legislative history

The contemporaneous legislative history consists of a May 6, 2002, Senate committee report for a bill containing what became § 1514A and statements in

---

construing any lingering ambiguities in deportation statutes in favor of the alien" (quoting *INS v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987)) (internal quotation marks omitted)); *INS v. Errico,* 385 U.S. 214, 225 (1966) (stating that the Court resolved doubt in the interpretation of an immigration statute in favor of the alien "because deportation is a drastic measure and at times the equivalent of banishment or exile" (quoting *Fong Haw Tan v. Phelan,* 333 U.S. 6, 10 (1948))).

the Congressional Record by Senator Leahy, a sponsor of that bill. We address each in turn.

The Corporate and Criminal Fraud Accountability Act of 2002, S. 2010, 107th Cong. (2002), was incorporated into SOX as Title VIII and contained the provision that would become § 1514A. The report of the Senate Judiciary Committee accompanying the Corporate and Criminal Fraud Accountability Act makes clear that Congress's primary concern was the Enron debacle, which involved the stock of a highly visible publicly traded company. *See* S. Rep. No. 107-146, at 2-5 (2002) (discussing Enron's collapse, its aftermath, and the need for reform).

The same committee report states that what became § 1514A "would provide whistleblower protection to employees of publicly traded companies," *id.* at 13, and that eventual § 1514A was intended to "provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company," *id.* at 18-19. These statements and others in the report accord with our interpretation. Only employees of publicly traded companies are mentioned; employees of private companies are not.

Senator Leahy stated that the provision that would eventually be codified as § 1514A "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud," 148 Cong. Rec. S1787 (daily ed. Mar. 12, 2002) (pre-enactment statement), and that "[a]lthough current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors," *id.* at S1788;[17] *see also* 149 Cong. Rec. S1725 (daily ed. Jan. 29, 2003) (statement of Sen. Leahy) (post-enactment) (§ 1514A "was intentionally written to sweep broadly, protecting any employee of a *publicly traded company* who took such reasonable action to try to protect investors and the market").

Plaintiffs point to the committee report's background discussion as supporting their position. The report decries retaliation against whistleblowers at Enron, a publicly traded company. *See* S. Rep. 107-146 at 4-5. But the report also discusses retaliation against employees at Arthur Andersen, a private entity which was both a consultant to Enron and its "independent" auditor. *See id.* at 3. The report states that "[i]n a variety of instances . . . corporate employees

---

[17] In the same remarks, Senator Leahy stated more broadly that "[o]ur laws need to encourage and protect those who report fraudulent activity that damages investors in publicly traded companies." 148 Cong. Rec. S1788 (daily ed. Mar. 12, 2002). Plaintiffs contend that this statement supports a broad reading of the statute: if the point of § 1514A is to protect investors in publicly traded companies, then it makes sense that the statute would protect whistleblowers who report fraud at such companies, even if a whistleblower is the employee of such a company's contractor or agent. We disagree that Congress meant to cast so broad a net.

at both Enron and Andersen attempted to report or 'blow the whistle' on fraud, but they were discouraged at nearly every turn." *Id.* at 4-5. The report also cites the fact that an "Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices in 2000" as an "example" of "a culture, supported by law, that discourage[d] employees from reporting fraudulent behavior." *Id.* at 5.

Congress's concern about Arthur Andersen was addressed by special provisions as to accountants. *See* SOX tit. I, 116 Stat. at 750-71 ("Public Company Accounting Oversight Board"); SOX tit. II, 116 Stat. at 771-75 ("Auditor Independence"). The committee's concerns regarding the integrity and independence of accountants and auditors are addressed in SOX by virtue of these provisions, and not by an expansive definition of "employee" in § 1514A(a).

2. <u>Post-enactment legislative activity</u>

After SOX's enactment, there have been two relevant attempts to amend the Act, one successful, the other not. As the Court said in *North Haven Board of Education v. Bell,* 456 U.S. 512 (1982), "[a]lthough postenactment developments cannot be accorded 'the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of' " previous enactments. *Id.* at 535 (quoting *Cannon v. Univ. of Chi.,* 441 U.S. 677, 686 n.7 (1979));

see also Goncalves v. Reno, 144 F.3d 110, 133 (1st Cir. 1998) ("[S]ubsequent legislative developments, although never determinative in themselves, can be 'significant' clues to congressional intent." (quoting *INS v. Cardoza-Fonseca,* 480 U.S. 421, 430 (1987))).

We turn to the failed effort to expand the term "employee" in § 1514A(a).[18] In 2004, Senator Fitzgerald introduced in the Senate a bill entitled the Mutual Fund Reform Act of 2004 (MFRA). S.2059, 108th Cong. (2004). Section 116(b) of MFRA would have amended § 1514A(a) to explicitly cover employees of investment advisers to mutual funds. As amended by MFRA, § 1514A(a) would have read:

> Whistleblower Protection for Employees of Publicly Traded Companies *and Registered Investment Companies* – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file

[18] We acknowledge that "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.' " *United States v. Craft,* 535 U.S. 274, 287 (2002) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 650 (1990)). However, the Court has used failed attempts to amend statutory language as aids to understanding Congress's intent. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 144 (2000) ("Congress considered and rejected bills that would have granted the FDA" jurisdiction to regulate tobacco.); *N. Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 534 (1982) ("Congress has refused to pass bills that would have amended § 901 to limit its coverage of employment discrimination.").

> reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), *or that is an investment adviser, principal underwriter, or significant service provider (as such terms are defined under section 2(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a))) of an investment company which is registered under section 8 of the Investment Company Act of 1940,* 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 –

S. 2059, 108th Cong. § 116(b) (emphasis added). MFRA was referred to the Senate Committee on Banking, Housing, and Urban Affairs, but it was never reported out of that committee.[19]

Defendants argue that MFRA is evidence that Congress did not believe § 1514A(a) covered employees of private contractors to public companies; if it did, then MFRA's amendment would have been superfluous. We are more cautious, because there is no statement in MFRA's legislative history regarding its sponsors' understanding of section 116(b) or of

[19] MFRA was also introduced in the House in 2004 as H.R. 4505 and referred to the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises. It was never reported out of that subcommittee.

§ 1514A(a).[20] *Cf. Seatrain Shipbuilding Corp. v. Shell Oil Co.,* 444 U.S. 572, 596 (1980) (considering legislative history discussing why Congress chose to amend a certain provision in one way but not another, and stating "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight" (citations omitted)). The Supreme Court has stated that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Craft,* 535 U.S. at 287 (alteration in original) (quoting *Cent. Bank of Denver, N.A.,* 511 U.S. at 187) (internal quotation marks omitted). At most, this is a clue, but far from conclusive.

Later, Congress did amend § 1514A(a). In 2010 the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) amended § 1514A by explicitly extending whistleblower coverage to employees of public companies' subsidiaries and employees

[20] The only statements regarding MFRA's whistleblower protection amendment in the Congressional Record are general. *See, e.g.,* 150 Cong. Rec. S794 (daily ed. Feb. 10, 2004) (statement of Sen. Fitzgerald) ("[MFRA] puts the interests of investors first by: . . . instituting Sarbanes-Oxley-style provisions for independent accounting and auditing, codes of ethics, chief compliance officers, compliance certifications, and whistleblower protections.").

of statistical rating organizations. Section 1514A(a) as amended by Dodd-Frank reads:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), 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 *or nationally recognized statistical rating organization,* 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 –

18 U.S.C. § 1514A(a), *as amended by* Pub. L. No. 111-203 §§ 922(b), 929A, 124 Stat. 1376, 1848, 1852 (2010) (emphasis added).

The report of the Senate Committee on Banking, Housing, and Urban Affairs accompanying Dodd-Frank explains that section 929A of that Act amended § 1514A(a) “to make clear that subsidiaries and affiliates of issuers may not retaliate against whistleblowers.” S. Rep. No. 111-176, at 114 (2010). The committee believed such a clarification was necessary because "[t]he language of [§ 1514A(a)] may be read as providing a remedy only for retaliation by the issuer, and not by subsidiaries of an issuer." *Id.*[21]

Furthermore, Senator Cardin, in remarks introducing an amendment to Dodd-Frank that became section 922(b) of that Act, explained that "Section 1514[A] delineates which companies are covered by [SOX] and what actions are prohibited. The Cardin-Grassley amendment expands the provision to include employees of the rating companies." 156 Cong. Rec. S3349 (daily ed. May 6, 2010). In the course of these remarks, Senator Cardin characterized § 1514A(a) as enacted by SOX as

> extend[ing] whistleblower protections to employees of any company that is registered under the SEC Act of 1934 or that is required to file reports under section 15(d) of the same act. The whistleblower provisions of the Sarbanes-Oxley Act protect employees of the publicly traded companies from retaliation by giving victims of such treatment a cause of action which can be brought in Federal court.

[21] As described later, the fact that DOL had issued what were non-substantive procedural regulations says nothing about congressional intent in SOX, enacted years earlier. That fact also is irrelevant to the Dodd-Frank amendments because Congress said its concern was to clarify § 1514A(a), and it said nothing about a regulation from DOL, much less one that did not and could not purport to provide a substantive interpretation of the SOX language at issue.

Id. Notably, Senator Cardin's statement again confirms that the covered employees are only those of publicly traded companies.

Dodd-Frank's successful amendments of § 1514A(a) are not subject to the rule of judicial wariness about legislative inaction. Rather, these later actions by Congress are entitled to some weight as an expression of Congress's understanding of § 1514A(a)'s meaning, which is consistent with our interpretation.

III.

No Deference Owed to Agency Positions

Congress chose not to give authority to the SEC or the DOL to interpret the term "employee" in § 1514A(a). So there is no basis for *Chevron* deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984). Because the term "employee" in § 1514A(a) is not ambiguous, we would not defer to an administrative agency's contrary determination, even had Congress delegated authority to the agency. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 127 S. Ct. 2518, 2534 (2007) ("[D]eference is appropriate only where 'Congress has not directly addressed the precise question at issue' through the statutory text.") (quoting *Chevron,* 467 U.S. at 843); *Saysana v. Gillen,* 590 F.3d 7, 16 (1st Cir. 2009) (because statutory language before the court "is unambiguous, there is nothing for the agency to interpret – no gap for it to fill – and there is no justification for resorting to agency interpretation to address an ambiguity"); *Succar v. Ashcroft,* 394 F.3d 8, 22-24 (1st Cir. 2005) (declining to defer to agency's interpretation of statute where statute's text is clear).

Here, independently, no deference is owed for the other reasons we discuss. The DOL, supported by the SEC, makes a threefold argument in favor of plaintiffs' interpretation. First, as to the particular OSHA regulations regarding coverage under § 1514A(a), the Secretary of Labor admits these regulations are entitled to no deference, and the defendants agree, for the reasons we state below.[22] OSHA has promulgated regulations regarding § 1514A in its capacity as the body with delegated authority to enforce its

[22] We accepted in dicta in *Day v. Staples, Inc.,* 555 F.3d 42, 54 & n.7 (1st Cir. 2009), that certain DOL regulations concerned with a two-part test for what constituted "reasonable belief" under SOX were entitled to *Chevron* deference. That test was also contained in the relevant case law. *Day* did not concern the issue here, nor the regulation relied on here. That statement in *Day* was not necessary to the holding in that case but was rather dicta, nor was the holding in the case concerned with the precise regulations at issue here. *Day* is easily distinguishable, and that dicta in *Day* is not binding on this panel. *Kosereis v. Rhode Island,* 331 F.3d 207, 213 (1st Cir. 2003).

Beyond that, the Secretary of Labor has disclaimed *Chevron* deference for the regulations at issue. In addition, the notice of final rulemaking promulgating them states that the procedural regulations are "not intended to provide statutory interpretations." 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004).

provisions.[23] These regulations purport to "implement[ ] procedures under section 806" of SOX, 29 C.F.R. § 1980.100(a) (2009), and they construe § 1514A(a)'s coverage provisions in plaintiffs' favor, *see id.* § 1980.101-.102.[24]

---

[23] Section 1514A delegates to the Secretary of Labor the authority to enforce the statute through formal adjudication. *See* 18 U.S.C. § 1514A(b)(1) ("A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c) by . . . filing a complaint with the Secretary of Labor. . . ."). The Secretary delegated enforcement responsibility for § 1514A to the Assistant Secretary of Occupational Health and Safety, *see* 67 Fed. Reg. at 65,008, and review of decisions by ALJs to the DOL's ARB, *see* 67 Fed. Reg. at 64,272-73.

[24] The regulations in effect at the pertinent times in this case state that

> "[n]o company or company representative may discharge, demote, suspend, threaten, harass or in any other manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, has engaged in any of the activities specified in paragraphs (b)(1) and (2) of this section."

29 C.F.R. § 1980.102(a) (2009). The regulations define "company representative" to mean "any officer, employee, contractor, subcontractor, or agent of a company," *id.* § 1980.101, and "employee" to mean "an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative," *id.*

These regulations, *id.,* are not entitled to *Chevron* deference, as the Secretary admits. *See Chevron,* 467 U.S. at 842-43. In addition, in promulgating the rules, the DOL made it clear the rules were not interpretations of the Act. In the notice of final rulemaking promulgating these regulations, OSHA repeatedly states that "[t]hese rules are procedural in nature and are not intended to provide interpretations of the Act." 69 Fed. Reg. 52,104, 52,105 (Aug. 24, 2004). In this case, the DOL has explicitly stated that "[t]he Department of Labor does not have substantive rulemaking authority with respect to section 1514A" and thus the Secretary of Labor does not seek *Chevron* deference "for her procedural regulations."

We also conclude that these particular OSHA regulations are not entitled to *Skidmore* deference for several reasons, including that the text of the statute does not permit even that level of deference. *See Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). Congress has made the choice and not given the agency a role. Further, "the *Skidmore* standard entails . . . a sliding-scale approach under which the degree of deference accorded to an agency interpretation hinges on a variety of factors, such as 'the thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and the] consistency [of its interpretation] with earlier and later pronouncements.'" *Doe v. Leavitt,* 552 F.3d 75, 81 (1st Cir. 2009) (alterations in original) (quoting *Skidmore,* 323 U.S. at 140). Moreover, as the Supreme Court has stated, an agency's statutory "interpretation is 'entitled to respect' only to the extent it has the 'power to persuade.'" *Gonzales v. Oregon,* 546 U.S. 243, 256 (2006) (quoting *Skidmore,* 323 U.S. at 140). The notice of final rulemaking here contains no reasoning to support OSHA's construction of the coverage provisions of § 1514A(a), saying only that "OSHA believes that [its regulations] accurately reflect the statutory language." 69 Fed. Reg. at 52,105-06. OSHA's reading, which it states is not a statutory interpretation, lacks the "power to persuade." We also note that the DOL's amicus brief does not argue that these particular OSHA regulations should be accorded *Skidmore* deference, nor does the SEC.

Second, if there were an on-point holding of the ARB, it might be entitled to some deference as to any ambiguity in the statute. The point is irrelevant for two reasons. First, we find no ambiguity, so no deference is owed. *Cf. Welch v. Chao,* 536 F.3d 269, 276 n.2 (4th Cir. 2008) (according deference to a decision of the ARB interpreting § 1514A because the statute expressly delegated to the Secretary of Labor authority to enforce the statute by formal adjudication and the Secretary delegated that power to the ARB). Second, there is in any event no ARB decision on point,[25] and the ALJ in the Zang case, at the level

[25] In *Johnson v. Siemens Building Technologies, Inc.*, the complainant brought a claim of retaliation under § 1514A against her employer, a subsidiary of a publicly traded company. The ARB disposed of the case by holding that § 1514A(a) as enacted by SOX covered employees of subsidiaries of public companies. In dicta to which no deference could be owed, the

(Continued on following page)

below the ARB, reached a conclusion consistent with ours. *See Zang,* 2008 WL 7835900.

We have considered the arguments in the amicus briefs of the DOL and SEC, but we owe no deference to the positions stated there. The SEC has no rulemaking or enforcement authority as to § 1514A, so its interpretation of that provision, in any form, would be owed no deference in any event. *See Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 143-44 (2002); *FLRA v. U.S. Dep't of the Navy,* 941 F.2d 49, 55 (1st Cir. 1991). The arguments advanced by the DOL, which does have authority to enforce § 1514A, *see* 18 U.S.C. §§ 1514A(b)(1), 1514A(b)(2)(A); 49 U.S.C. § 42121(b), mirror the textual arguments of the plaintiffs and are not based on the DOL's "specialized experience." *Skidmore,* 323 U.S. at 139. In addition, we view the text of § 1514A(a) as clear.

IV.

Conclusion

If we are wrong and Congress intended the term "employee" in § 1514A(a) to have a broader meaning than the one we have arrived at, it can amend the statute. We are bound by what Congress has written.

ARB stated that SOX's "legislative history demonstrates that Congress intended to enact robust whistleblower protections for more than employees of publicly traded companies." 2011 WL 1247202, at *12.

Reversed and remanded with instructions to dismiss the actions. No costs are awarded.

– – Dissenting Opinion Follows – –

THOMPSON, ***Circuit Judge*****, dissenting**. Because my colleagues impose an unwarranted restriction on the intentionally broad language of the Sarbanes-Oxley Act, employ a method of statutory construction diametrically opposed to the analysis this same panel employed just weeks ago, take pains to avoid paying any heed to considered agency views to which circuit precedent compels deference, and as a result bar a significant class of potential securities-fraud whistleblowers from any legal protection, I dissent.

Accepting the allegations in the complaint as true, plaintiffs Lawson and Zang are ex-employees of private companies that contract to advise or manage the publicly held Fidelity-brand mutual funds. The mutual funds themselves have no employees. Both plaintiffs blew the whistle on putative fraud by the mutual funds, and both were fired (actually or constructively) by their employers.

The Sarbanes-Oxley Act purports to protect securities-fraud whistleblowers. Specifically, § 806 of the Act provides that "[n]o company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*l*), or that is required to file reports under section 15(d) of the

Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), 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" to report activity the employee reasonably suspects to be securities fraud. 18 U.S.C. § 1514A(a) (prior to amendment by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010).

For present purposes, it is undisputed that the Fidelity mutual funds fall under § 806, that the plaintiffs' employers contracted with the Fidelity mutual funds, and that the plaintiffs' employers discharged the plaintiffs – their employees. In other words, in each case a "contractor . . . of such company . . . discharge[d] . . . an employee." *Id.* One might think our inquiry would end here: Sarbanes-Oxley's whistleblower-protection provision by its terms applies. According to the majority, however, one would be incorrect.

The majority engage in a faulty statutory-interpretation exercise, one whose wrongness is perhaps best highlighted through contrast with our recent decision in *United States v. Ozuna-Cabrera,* 663 F.3d 496 (1st Cir. 2011). In *Ozuna-Cabrera,* we held that application of the "Aggravated Identity Theft" statute is not restricted to situations involving traditional theft. *Id.* at 501. This is how our analysis went:

First, we looked to the plain language of the statute and noted that it contained no restriction limiting the statute's application to situations involving theft. *Id.* at 498-99. Instead, the statute contained only the broad phrase "without lawful authority." *Id.* Second, we looked to the statutory framework, noting that the phrase "without lawful authority" was used in the statutes criminalizing both identity fraud and aggravated identity theft. *Id.* at 499. Because identical language appeared in both, related statutes, only one of which referenced theft at all (albeit in the title), we deemed it unlikely that Congress intended the phrase to import the elements of common-law theft. *Id.* Third, in a footnote, we looked to the statutory title (which, again, referenced theft) and noted that "we do not rely on the titles of statutory enactments in plumbing their meaning . . . at the expense of the text itself." *Id.* at 499 n. 3 (internal quotation marks removed). We also noted that it was by no means clear that the word "theft" in the title was intended to limit the effective language of the statute. *Id.* (citing *United States v. Godin,* 534 F.3d 51, 59 (1st Cir. 2008)). Fourth and finally, we looked at legislative history and noted that implicitly restrictive references to "theft" could not limit the scope of broad statutory language. *Id.* at 500. More specifically, nothing in the legislative history explicitly suggested "that Congress intended to so narrowly restrict the statute's reach." *Id.* Instead, the legislative history "demonstrate[d] that Congress intended [the statute] to address a wide array of " conduct. *Id.* Applying this same analysis to the present case produces a very different result than the one the majority reach.

First, looking to the plain language of the statute, one can only conclude that there is no restriction limiting the statute's application to employees of publicly held companies.[26] As I have already pointed out, boiling the statute down to its relevant syntactic elements, it provides that "no . . . contractor . . . may discharge . . . an employee." 18 U.S.C. § 1514A(a). The statute does not limit its coverage to "an employee of a publicly held company" – it just refers broadly to "an employee."

In fact, the majority's interpretation offends a longstanding rule of statutory interpretation, violating the statutory language by rendering the word "contractor" in the statute superfluous. *See, e.g., United States v. Ven-Fuel, Inc.,* 758 F.2d 741, 751-52 (1st Cir. 1985) (providing that "no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous"). The majority suggest that the word "contractor" might be intended only to refer to so-called

[26] In addition to our own recent decision in *Ozuna-Cabrera,* a days-old Supreme Court decision has just reaffirmed the impropriety of imposing extra-textual limitations on statutes: where "[t]here is no indication in the text . . . that the [statute] excludes [particular] workers from . . . coverage," the reasonable conclusion is "that Congress did not limit the scope of [the statute]'s coverage." *Pac. Operators Offshore, LLP v. Valladolid,* No. 10-507, 2012 WL 75045, at *8 (U.S. Jan. 11, 2012).

"ax-wielding specialists" that public companies bring in to lay off employees. Maj. Op. 17 n.11; *see also Fleszar v. U.S. Dept. of Labor,* 598 F.3d 912, 915 (7th Cir. 2010) (employing the term "ax-wielding specialist" and providing the example of "the character George Clooney played in 'Up in the Air' "). If that is indeed the case, it is a mystery why Congress did not say so specifically. But more importantly for present purposes, when ax-wielding specialists actually fire public-company employees they are acting as agents (rather than mere contractors) of the public company. And § 806 specifically lists agents as covered entities, just like contractors. The word "contractor," therefore, must be doing something else. In the end, then, not only do the majority impose extratextual limitations on § 806, but they also effectively evict the word "contractor" from the statute.[27] This is simply wrong. *See Ven-Fuel,* 758 F.2d at 751-52.

Second, looking to the statutory framework, one sees that Congress explicitly enacted narrower whistleblower protection elsewhere in Sarbanes-Oxley, that Congress was explicit where it intended to regulate public entities only, and that Congress's choices about different mechanisms for different entities support the plaintiffs' reading of the Act. *Cf.*

[27] The majority state correctly that their interpretation does not render superfluous the *phrase* "officer, employee, contractor, subcontractor, or agent of such company" – but that is not my point. Maj. Op. 16. My point, which remains unrebutted, is that their interpretation renders superfluous the *word* "contractor."

Maj. Op. 21-22 (noting that Congress explicitly "enact[ed] broader whistleblower protection elsewhere . . . was explicit . . . where it intended to regulate non-public entities . . . [and] made choices about different regulatory mechanisms for different entities").

An example of Congress's enactment of narrower whistleblower protection appears in Sarbanes-Oxley § 501, which bars "a broker or dealer and persons employed by a broker or dealer" from retaliating against "any securities analyst employed by that broker or dealer or its affiliates." 15 U.S.C. § 78o-6(a)(1)(C). Congress could have similarly narrowed the definition of "employee" in § 806, but it chose not to do so. We should honor that choice.[28] *Limone v. United States,* 579 F.3d 79, 105 (1st Cir. 2009); *see also Pac. Operators,* 2012 WL 75045, *6 ("Congress' decision to specify, in scrupulous detail, exactly where the other subsections of § 1333 apply, but to include no similar restriction . . . in § 1333(b), convinces us that Congress did not intend" to so limit § 1333(b).).

An example of Congress's specific reference to publicly held companies appears in § 806 itself.

[28] Moreover, the majority's contrary example of broader whistleblower protection elsewhere in Sarbanes-Oxley is wrong. Not only is the referenced provision (§ 1107, enacted at 18 U.S.C. § 1513) actually narrower than § 806 in some respects – for example, it covers whistleblowing only to police, not to work supervisors – but it also does nothing to protect whistleblowers. In essence, it is nothing more than a criminal obstruction-of-justice statute targeted at wrongdoers, not a whistleblower-protection statute targeted at the wronged.

Section 806 specifically invokes companies "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*l*)" or "required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d))." The section goes on to list a number of other covered entities, including contractors. It also uses the modifier "of such companies" at one point to refer to, e.g., contractors, but notably *not* to refer to employees. In fact, the section does not limit the word "employees" in any way. Again, we should honor Congress's choice to employ broad language. *Limone,* 579 F.3d at 105.

And the majority's own examples of Congress's electing to apply different mechanisms to different entities highlight the correctness of a broad reading of § 806. The majority note that "[e]lsewhere in SOX, Congress did specifically address investment companies and investment advisers." Maj. Op. 27. The first example they look to is a provision that *exempts* investment entities (including mutual funds and mutual fund advisers) from certain, specific requirements of the Act. *See* 15 U.S.C. § 7263. No such exemption appears in § 806, and the absence of an exemption surely suggests that Congress intended to protect the employees of mutual fund advisers.[29] The majority's second example – 15 U.S.C. § 80b-3 – deals with the "Registration of investment advisers" and

[29] Indeed, as the majority note, Congress "made it explicit when it intended coverage *and when it did not.*" Maj. Op. 27 (emphasis added).

says nothing of whistleblowers. Maj. Op. 27. The existence of a section tailored to investment advisers hardly exempts such entities from Sarbanes-Oxley's broader provisions – like § 806. After all, Congress knew how to exempt investment entities when it wanted to do so. *See* 15 U.S.C. § 7263.

Third, the statute's title and caption do not compel a limited reading of its language; instead, the majority's strained reading comes "at the expense of the text itself." *Ozuna-Cabrera,* 663 F.3d at 499 n.3. I have already explained how nothing in either the text or the context of § 806 actually supports the limitation conjured by the majority. A few words in a title are not sufficient to change that rock-solid fact. That insufficiency is especially glaring where, as here, the title does not purport to apply any explicit limitations (e.g., "whistleblower protection for employees of public companies *only*") but merely describes a specific and common application of a more generally applicable statute.[30] *Cf. Ozuna-Cabrera,* 663 F.3d at 500 ("aggravated identity theft" may commonly apply to "criminals who actually steal other people's identities," but this is only one application of a broad statute). Under *Ozuna-Cabrera* and other circuit precedent, *see, e.g., Mass. Ass'n of Health Maint. Orgs. v. Ruthardt,* 194 F.3d 176, 180 (1st Cir. 1999), the title gets the majority nowhere.

---

[30] I repeat: the title contains no "explicit guides to the limits" on § 806. Maj. Op. 18.

Fourth, nothing in the legislative history of Sarbanes-Oxley indicates congressional intent to limit whistleblower protection to employees of public companies. Instead, the legislative history all refers positively to extending whistleblower protection in order to encourage the reporting of securities fraud.

According to Sarbanes-Oxley's Senate conference report (Section I, titled "PURPOSE") a key purpose of the chapter that includes § 806 is "to protect whistle-blowers who report fraud against retaliation by their employers." S. Rep. No. 107-146, at *1 (2002). There is no mention of any limitation on which employers are covered. The breadth of this specific purpose comports with the Act's overall purpose: "to prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions." *Id.* Indeed, this very court has endorsed a broad understanding of the Act's purpose, noting that "[t]he § 1514A whistleblower provision thus serves to 'encourage and protect [employees] who report fraud-ulent activity that can damage innocent investors in publicly traded companies'" and that "[i]t also aimed 'to provide federal protection to private corporate whistleblowers.'" *Day v. Staples, Inc.,* 555 F.3d 42, 52 (1st Cir. 2009) (alteration in original) (quoting S. Rep. No. 107-146, at *17 (2002), and *Carnero v. Bos. Scientific Corp.,* 433 F.3d 1, 11 (1st Cir. 2006)). Again, extending whistleblower protection to employees of contractors fits both with the specific whistleblower-protection purpose of Sarbanes-Oxley and with its broader anti-fraud purpose.

Moreover, none of the legislative history the majority rely on actually evidences any congressional intent to *limit* the scope of § 806's whistleblower protection. All of the statements the majority highlight denote intent to protect employees of publicly traded companies. *See* Maj. Op. 37-38. Such protection is a wholly uncontroversial and undisputed effect of § 806.[31] The question is whether protection is limited to employees of public entities only. And none of the majority's sources – indeed, no source at all – expresses any intent to restrict § 806 so narrowly.[32]

---

[31] Also uncontroversial and undisputed is the majority's discussion in its "Legislative History" section of Congress's addressing "concern about Arthur Andersen" with "special provisions as to accountants." Maj. Op. 39. In addition to being uncontroversial and undisputed, however, Sarbanes-Oxley's special provisions as to accountants are irrelevant here.

[32] The majority's reference to Senator Cardin's statement is a textbook example of their imputing an intent to limit where none is evident. Specifically, Senator Cardin's statement says that "[t]he whistleblower provisions of the Sarbanes-Oxley Act protect employees of the publicly traded companies," 156 Cong. Rec. S3349 (daily ed. May 6, 2010); the majority say this statement "confirms that the covered employees are *only* those of publicly traded companies." Maj. Op. 44 (emphasis added). As I point out above, the word "only" would indeed indicate limiting intent – if it appeared in Senator Cardin's statement (or, for that matter, in absolutely any relevant legislative materials whatsoever). But it does not, so neither does any limiting intent.

Cf. Ozuna-Cabrera, 663 F.3d at 500 ("Without question, Congress harbored concerns over criminals who actually steal other people's identities. There is nothing to suggest, however, that Congress intended to so narrowly restrict the statute's reach."). It is strange that the same circumstance – lack of congressional intent to limit broad statutory language – could cut so differently in two different cases.

And the majority's reliance on subsequent legislative history is entirely misplaced. Not only does their reading of the whistleblower provision's subsequent amendment defy their own faulty logic, but they also ignore the administrative backdrop against which Sarbanes-Oxley was amended by Dodd-Frank.

On the first point, the majority's read of Dodd-Frank defeats their overall conclusion as a matter of simple grammar. On the one hand, they say that the phrase (from 18 U.S.C. § 1514A) "No [public company], or any . . . contractor . . . of such company, may discharge . . . an employee" *does not* extend protection to employees of contractors. On the other hand, they say that the phrase (from the same section, post-Dodd-Frank) "No [public company] . . . or nationally recognized statistical rating organization . . . may discharge . . . an employee" *does* apply to employees of ratings companies. Maj. Op. 42 (noting that Dodd-Frank "explicitly extend[ed] whistleblower coverage to . . . employees of statistical rating organizations"). In these phrases, "contractor" and "rating organization" are syntactic equivalents and should therefore be given equal effect. The statute plainly protects *both* employees of contractors *and* employees of rating companies.

As to the majority's ignoring the administrative backdrop, let us start with the well-settled proposition that the courts, when construing a statute, assume that at the time of the statute's enactment, Congress was aware of courts' and agencies' interpretations of existing law. *Lorillard v. Pons,* 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change."). At the time of Dodd-Frank, the Department of Labor (which is statutorily tasked with administratively adjudicating § 806 whistleblower claims, *see* 18 U.S.C. § 1514A(b)(1)) had issued notice-and-comment regulations explicitly providing that § 806 applied to employees of contractors of public companies. 29 C.F.R. § 1980.101 (2009) (defining "employee" as "an individual presently or formerly working for a company or company representative" and "company representative" as, e.g., "any . . . contractor . . . of a company"). In enacting Dodd-Frank in 2010, then, Congress had a miles-wide opening to nip Labor's regulation in the bud if it had wished to do so. It did not. To the (very limited) extent subsequent legislative history tells us anything here, it tells us that the majority are incorrect.

So if circuit precedent has any kind of methodological value then the majority go about things exactly backwards in this case. To reiterate: contrary to this panel's analysis in *Ozuna-Cabrera,* the majority ignore the text of § 806, take a myopic view of the section's context, wrongly inflate the section's title into operative law, and attribute a limiting intent to legislative history that in reality supports a broad reading of the statute. Again, the majority are wrong.[33]

To the extent the majority rely on analogous statutes, they get that wrong, too. There is indeed evidence that Sarbanes-Oxley was based in part on the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR"). *See* S. Rep. 107-146, at *26 (2002). The relevant provision of AIR is entitled "Discrimination against airline employees," and reads, "[n]o air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee." 49 U.S.C. § 42121(a). This structure perfectly parallels § 806's:

---

[33] The majority's result seems to be driven by § 806's "very broad coverage." Maj. Op. 17. But very broad coverage was the precise goal of § 806. *See* Maj. Op. 37 n.17 (considering legislative history supporting broad whistleblower coverage, then rejecting that history by ipse dixit). The majority also refer obliquely to "anomalies" that would occur if we were to give § 806 the broad scope Congress intended; however, they never identify what those "anomalies" are. Maj. Op. 17. I, for one, can discern no "anomalies" in a determination that § 806 protects whistleblowers against retaliation by their employers. If the majority consider anomalous the unlikely scenario where an employee of, say, office superstore Staples manages to spot and report securities fraud in the course of, say, printing and binding a public company's financial reports, I see no reason why that employee should not be a protected whistleblower as a matter of either law or policy.

"[n]o company . . . or any . . . contractor [or] subcontractor . . . of such company, may discharge . . . or in any other manner discriminate against an employee." Just as in § 806, AIR does not specify whether it protects employees of carriers only or whether it protects employees of contractors and subcontractors as well. The majority conclude that AIR protects employees of carriers, contractors, and subcontractors, but that § 806 protects only employees of public companies, primarily because – in the majority's view, notwithstanding the broad language passed by the legislative branch and the considered interpretation of the executive branch – § 806 would be excessively broad.[34] Maj. Op. 28-29. This is judicial overreaching of the highest order.[35]

---

[34] AIR, according to the majority, is not *excessively* broad because it includes a subsection that narrowly defines "contractor." But the majority's reliance on AIR's narrower provision as the example proving that § 806's apparently broader provision is actually narrower than AIR's is a logical Escher stairway – it's just as nonsensical as it sounds. That AIR has a limiting definition means AIR is narrow. That § 806 has no limiting definition means § 806 is broad. Logic and grammar preclude any contrary conclusion. And the same reasoning demonstrates that the majority cannot properly rely on analogous whistleblower statutes that include limiting definitions. *See* Maj. Op. 31-32 (discussing the Energy Reorganization Act, 42 U.S.C. § 5851(a)(1), and the Pipeline Safety Improvement Act, 49 U.S.C. § 60129(a)).

[35] Indeed, during this appeal's pendency, the Supreme Court has again reaffirmed the impropriety of judges' limiting the scope of a statute's coverage for policy reasons: " '[I]f Congress' coverage decisions are mistaken as a matter of policy, it is for

(Continued on following page)

Other basic principles of statutory interpretation support a broad reading of § 806 and undermine the majority's reasoning. These principles are: (1) that we broadly interpret remedial statutes; (2) that we narrowly interpret criminal and immigration statutes; and (3) that we presume a statute will not create a right of action by implication. The relevance of these principles here is not immediately apparent, so I will explain.

First, courts generally adhere to the principle that "[r]emedial statutes are liberally construed to suppress the evil and advance the remedy." 3 Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 60:1 (7th ed. 2010); *accord Dudley v. Hannaford Bros. Co.,* 333 F.3d 299, 307 (1st Cir. 2003) (citing *Tcherepnin v. Knight,* 389 U.S. 332, 336 (1967)). It should be achingly clear at this point that § 806 is remedial in nature; specifically, it aims to remedy the evil of companies' firing employees for reporting putative securities fraud. Where the statutory language supports a broad reading that comports with that remedial purpose, precedent calls for courts to implement that broad reading. *See Dudley,* 333 F.3d at 307. The majority inexplicably fail to heed this call.

Congress to change them. We should not legislate for them.'" *Pac. Operators,* 2012 WL 75045 at *9 (quoting *Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 427 (1985)).

Second, at the opposite end of the interpretative spectrum is the so-called rule of lenity, an "ancient rule of statutory construction that penal statutes should be strictly construed against the government . . . and in favor of the persons on whom penalties are sought to be imposed." 3 Singer, *Sutherland Statutory Construction* § 59:3. In *Ozuna-Cabrera,* a criminal case, we held that this principle had no place because the text did not support the defendant's proposed limitations. *See* 663 F.3d at 498-99. Now, in a context where we are supposed to default to breadth and reject narrowness, the majority nevertheless impose analogous extratextual limitations. This is precisely backwards.

In fact, in rejecting a broad reading of § 806 and imposing a narrow one, the majority rely in significant part on cases where (unlike here) narrow interpretations were absolutely appropriate under the rule of lenity. For example, in *I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc. (NCIR),* 502 U.S. 183 (1991), the Supreme Court narrowed the scope of the word "employment" as used in a statute imposing restrictive bond conditions on aliens embroiled in removal proceedings.[36] In other words, by narrowing the types

[36] The rule of lenity applies to immigrants in removal proceedings as well as defendants in criminal proceedings. *See, e.g., I.N.S. v. St. Cyr,* 533 U.S. 289, 320 (2001) (relying on "'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien'" (quoting *I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987))).

of employment that immigrants could not undertake while out on bond, the Court benefitted them and thereby honored the rule of lenity. *NCIR* does not by any means suggest that a restrictive interpretation is appropriate to strip intentionally broad legal protections from whistleblowers.[37]

Third and last is the presumption against implied rights of action. The majority repeatedly cite cases expressly applying this principle as if these cases somehow support limiting *explicit* causes of action, too. Here is a list of several such cases on which the majority wrongly rely: *Janus Capital Grp., Inc. v. First Derivative Traders,* 131 S. Ct. 2296, 2303 (2011) (holding that a mutual fund adviser may not be found liable for a mutual fund's violation of SEC Rule 10b-5, in part because of "the narrow scope that [courts] must give the implied private right of action"); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,* 128 S. Ct. 761, 772 (2008) (noting that courts should limit the scope of implied rights of action because judicial creation of such remedies "runs contrary to the established principle that '[t]he jurisdiction of the federal courts is guarded against

[37] Let me be perfectly clear: my point is that the majority are wrong to rely on cases subject to the rule of lenity. And despite disclaiming any reliance on the *rule,* the majority still rely on *cases* where the rule applies. *Compare* Maj. Op. 19-20 (providing that the majority "follow the same reasoning" as *NCIR*), *with* Maj. Op. 35 (providing that "the rule of lenity has no place in our interpretation of § 1514A(a)").

expansion by judicial interpretation'" (quoting *Cannon v. Univ. of Chi.,* 441 U.S. 677, 746-47 (1979) (Powell, J., dissenting))); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 176 (1994) (holding that the implied right of action under SEC Rule 10b-5 does not extend to aiders and abetters because "Congress knew how to impose aiding and abetting liability when it chose to do so"); *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 734 (1975) (limiting the availability of the implied right of action under Rule 10b-5 to actual purchasers and sellers of securities, in part because "[w]hen Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble doing so expressly"). Here, we are not faced with an implied right of action that should be applied narrowly; instead, we are dealing with a statute that expressly creates a broad right of action for employee-whistleblowers who suffer retaliation at their employers' hands. By rejecting Congress's intentional breadth, the majority undermine the legislative process in precisely the same way that the Supreme Court has warned against time and time again in the context of implied rights of action. That they do so by restricting a broad statute rather than expanding a narrow statute is beside the point: they are still usurping Congress's lawmaking role in our system of government.

Even more egregious, though, is the majority's conclusion – after thirty-five pages construing a statutory provision to which they say "different readings may be given," Maj. Op. 14 – that the statute is "not ambiguous" and even "clear" in imposing a limitation on the word "employee" that appears nowhere in the statute's text. *Id.* at 44, 49. This peculiar determination[38] appears to be nothing more than a mechanism for rejecting the views of multiple federal agencies[39] that come into daily contact with the Sarbanes-Oxley Act and its whistleblower provision, and for downplaying this court's earlier determination that agency views are entitled to deference. In fact, the clearest thing about the statute is its breadth, as the Department of Labor's regulations confirm.

As I've mentioned above, the Department of Labor has adjudicatory authority over Sarbanes-Oxley whistleblower complaints.[40] 18 U.S.C. § 1514A(b)(1). To exercise that authority, the Department of Labor has promulgated regulations regarding Sarbanes-Oxley.

---

[38] The determination is peculiar, in part, because of the basic principle that a court will generally look beyond a statute's text only when interpreting ambiguous statutes. *See, e.g., Gen. Motors Corp. v. Darling's,* 444 F.3d 98, 108 (1st Cir. 2006) (noting that "we . . . will only look behind the plain language to the legislative history if we find the statute ambiguous" (internal quotation marks omitted)).

[39] Although my dissent limits its discussion to the Department of Labor's regulations, the Securities and Exchange Commission, too, has filed an amicus brief in this case urging the same broad interpretation of § 806.

[40] Congress has not given Labor substantive rule-making authority, but this does not matter for reasons I will discuss shortly.

29 C.F.R. § 1980.100 *et seq*. The regulations specifically provide that Sarbanes-Oxley's whistleblower protection extends to employees of contractors of public companies. *Id.* § 1980.101. On this point, Labor found the statute as clear as I do: the regulations proclaim that they are non-interpretative, 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004), so Labor must have thought the statute simply means what it says: "[n]o . . . contractor . . . of such company[ ] may discharge . . . an employee" for reporting fraud. 18 U.S.C. § 1514A(a). And we have previously held that the regulations are entitled to *Chevron* deference, *Day,* 555 F.3d at 54 & n.7, meaning that we should honor Labor's read of the statute unless it is arbitrary and capricious or contrary to law. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 844 (1984).

Again, all this would seem to end our inquiry. Not only does Sarbanes-Oxley § 806 by its terms protect employees of contractors of public companies, but the agency that handles every § 806 whistleblower complaint has issued formal regulations recognizing that straightforward interpretation, and this court has held that the regulations are owed deference. But, somehow, the authority of all three branches of government does not win the day: the majority disregard Congress's broad language, reject the agency's regulations out of hand, and do their best to neutralize this court's decision in *Day* by labeling it both distinguishable and dicta. Maj. Op. 45 n.22.

Here is what we said in *Day:* "Both the DOL regulations, which are entitled to *Chevron* deference, and the caselaw establish that the term 'reasonable belief' has both a subjective and objective component. We agree." *Day,* 555 F.3d at 54. We then went on to explain why the regulations were due *Chevron* deference, noting among other things that "Congress explicitly delegated to the Secretary of Labor authority to enforce § 1514A by formal adjudication." *Id.* at 54 n.7. This is not the stuff of dicta. We did not merely "accept . . . that certain DOL regulations . . . were entitled to *Chevron* deference," Maj. Op. 45 n.22 – we stated affirmatively that they were, explained our reasoning on the point, and relied on the conclusion in reaching our result. And our broad statement may not have been "concerned with the precise regulations at issue here," *id.,* but it did not purport to involve *precise* regulations; instead, it spoke sweepingly of Labor's regulations regarding § 1514A. If *Day* remains good law then it controls here and we owe deference to Labor's regulations.

That said, we need not go so far as to apply *Chevron* deference here. While the Department of Labor does suggest that *Day* compels some degree of deference, it concedes that the regulations are properly due something less than *Chevron* deference. Naturally, the *Skidmore* doctrine comes to mind.

In *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944), the Supreme Court held that considered agency views – even informal ones – should provide guidance to the courts to the extent those views have the "power to persuade." We have applied the *Skidmore* rule to agencies' views in cases "'where statutory circumstances indicate no [congressional] intent to delegate general authority to make rules with force of law.'" *Navarro v. Pfizer Corp.,* 261 F.3d 90, 99 (1st Cir. 2001) (quoting *United States v. Mead Corp.,* 533 U.S. 218, 237 (2001)). Here we have such a case. Even though Labor lacks statutory authority to issue substantive rules regarding § 806, and even though Labor has labeled its regulations non-interpretative, under *Skidmore* we still cannot just throw its considered views out the window.

Nevertheless, the majority conclude that *Skidmore* has no place here. First, they say, the statute is unambiguous and, therefore, Labor can add nothing to its construction. Maj. Op. 44. On the heels of the majority's lengthy statutory-interpretation analysis, this claim holds no water. A statute that is susceptible of multiple interpretations and whose meaning requires over thirty pages to explain is neither clear nor unambiguous by definition. *See, e.g.,* 2A Singer, *Sutherland Statutory Construction* § 45:2 ("Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses."). And if the statute is not, in fact, unambiguous, then *Skidmore* deference is in play.

In guiding judicial inquiry into the appropriate level of respect we should give Labor's views, *Skidmore* requires consideration of "the thoroughness evident in [Labor's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Skidmore,* 323 U.S. at 140. First, contrary to the majority's determination that Labor provided "no reasoning," Maj. Op. 48, Labor spent a paragraph explaining that the language of § 806, taken literally, extends protection to employees of contractors of public companies. *See* 69 Fed. Reg. at 52,105-06. The majority never convincingly overcome the agency's simple application of basic grammar to the statute,[41] and so can only pretend it isn't there.

Continuing with the other *Skidmore* factors, the agency's reasoning is valid because the statute's plain language does extend coverage to employees of contractors (as I have explained above). And as for consistency, for as long as the regulations have existed they have consistently extended protection to employees of contractors of public companies. *Compare* 29 C.F.R. § 1980.101 (2003), *with* 29 C.F.R. § 1980.101 (2011), *as amended by* 76 Fed. Reg. 68,084 (Nov. 3, 2011). The majority cannot claim the same consistency in this court's jurisprudence. *Compare Day,* 555 F.3d at 52, 54 & n.7 (noting that § 806 aims to "prohibit[ ] employers from retaliating against employees" and "to encourage and protect employees who report

[41] In fact, the majority implicitly acknowledge the validity of Labor's grammatical reading earlier in their opinion, when they say it merits "little discussion" that the statute "may be read differently as to the scope of the protected 'employees' as a matter of grammar." Maj. Op. 15. If Labor's paragraph applying the basic rules of language to the statute constitutes "no reasoning," then one wonders how to characterize the majority's "little discussion."

fraudulent activity," and holding that the Labor regulations "are entitled to *Chevron* deference" (internal quotation marks and brackets omitted)), *with* Maj. Op. 45 n.22. Because all three *Skidmore* factors weigh in Labor's favor, we owe deference to the Department of Labor's regulations. And that means § 806 extends whistleblower protection to employees of contractors of public companies.

To sum the whole thing up, § 806 plainly protects whistleblower employees of contractors of public companies; digging deeper into the section's context and legislative history only confirms the breadth of § 806's protections; considered agency views further support a broad read of the statute; and the majority have had to work very hard to reject not only our own precedent but also the views of the other branches of government, to say nothing of grammar and logic. The simple answer to the certified question from the district court[42] is yes. For these reasons, I dissent.

---

[42] "Does the whistleblower protection afforded by § 806(a) of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, apply to an employee of a contractor or subcontractor of a public company, when that employee reports activity which he or she reasonably believes may constitute a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348; any rule or regulation of the Securities and Exchange Commission; or any provision of Federal law and such a violation would relate to fraud against shareholders of the public company?"

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

<table>
<tr><td>JACKIE HOSANG LAWSON,

Plaintiff,

v.

FMR LLC, dba FIDELITY INVESTMENTS; FMR CORP., dba FIDELITY INVESTMENTS; and FIDELITY BROKERAGE SERVICES, LLC, dba FIDELITY INVESTMENTS,

Defendants.</td><td>)</td><td>CIVIL ACTION
NO. 08-10466-DPW</td></tr>
<tr><td>JONATHAN M. ZANG,

Plaintiff,

v.

FIDELITY MANAGEMENT & RESEARCH COMPANY, FMR CO., INC., and FMR LLC f/k/a FMR CORP.,

Defendants.</td><td>)</td><td>CIVIL ACTION
NO. 08-10758-DPW</td></tr>
</table>

MEMORANDUM AND ORDER
March 31, 2010

This Memorandum addresses motions to dismiss in two separate cases alleging unlawful retaliation against employees of nonpublic companies in the mutual fund industry who complained of improper business activities by their employers. Because the cases share a common defendant, FMR LLC, and both raise the question of the reach of the Corporate and Criminal Fraud Accountability Act of 2002, also known as the Sarbanes-Oxley Act ("SOX"), I address them jointly. In particular, the plaintiffs in both cases seek the protection of Section 806, the SOX whistleblower provision, administered through the Occupational Safety and Health Administration ("OSHA") of the Department of Labor ("DOL"). 18 U.S.C. § 1514A.

In the first case (No. 08-10466), Jackie Hosang Lawson seeks relief against her former employers, FMR LLC, FMR Corp. and Fidelity Brokerage Services, LLC (collectively "Fidelity Investments"). Lawson's employment at Fidelity Investments ended in September 2007, when she concluded she had no choice but to tender her resignation.

In the second case (No. 08-10758), Jonathan M. Zang seeks relief against his former employers, Fidelity Management & Research Company, FMR Co., Inc. and FMR LLC (collectively "Fidelity Management"). Zang worked for Fidelity Management from 1997 until July 2005, when his employment was terminated.

Both Fidelity Investments and Fidelity Management have moved to dismiss the cases pursuant to Fed. R. Civ. P. 12(b)(6).

I. FACTUAL BACKGROUND

In summarizing the factual background of this litigation, I take all well-pleaded facts contained in the Complaints as true, and I draw all reasonable inferences in the Plaintiffs' favor. *In re Citigroup, Inc.,* 535 F.3d 45, 52 (1st Cir. 2008). These facts "may be derived from the complaint, from documents annexed to or fairly incorporated in it, and from matters susceptible to judicial notice." *Warren Freedenfeld Assocs., Inc. v. McTigue,* 531 F.3d 38, 44 (1st Cir. 2008). A court is entitled, however, to disregard "bald assertions, unsupportable conclusions, and opprobrious epithets." *In re Citigroup,* 535 F.3d at 52 (quoting *Ruiz v. Bally Total Fitness Holding Corp.,* 496 F.3d 1, 4 (1st Cir. 2007)).

A. Lawson's Claims

1. <u>The Parties</u>

The Defendants in Lawson's suit are three privately held companies involved in the business of mutual fund investments. Defendant FMR LLC is the successor to Defendant FMR Corp., and Defendant Fidelity Brokerage Services, LLC ("Fidelity Brokerage") is its subsidiary.[1] Together they conduct business under the name "Fidelity Investments." Their

---

[1] Lawson names FMR Corp. as a defendant, but according to her Amended Complaint (as well as the Defendants' Memorandum for its Motion to Dismiss) FMR Corp. has been merged into FMR LLC.

business, according to Lawson, includes acting as investment advisers to the Fidelity family of mutual funds ("Funds"), which are separate investment companies under the Investment Company Act of 1940, 15 U.S.C. § 80a-3(a)(1). The Funds, which are publicly held companies, have no employees, but are rather overseen by a single Board of Trustees.

Fidelity Management & Research Company ("FMR Co."), not named as a defendant in Lawson's suit, is a subsidiary of FMR Corp. and/or FMR LLC. FMR Co. serves as the registered investment adviser to the Funds under 15 U.S.C. § 80b-2(a)(11). FMR Co. provides services pursuant to a written contract approved by the Fund's Board of Trustees. Before approving these contracts, the Board of Trustees reviews the financial data and methodologies that determine the Funds' profitability, as provided by FMR LLC and its subsidiaries.

Lawson began working at Fidelity Investments in 1993 as a contract employee. She became a full-time employee in 1996, and was promoted to Director of Finance in 1999. In 2001, she was promoted to Senior Director of Finance. Her specific employer until 2007 was Fidelity Brokerage.

2. <u>Alleged Protected Activities and Retaliation</u>

a. Protected Activities

From the face of the Complaint, it is not readily apparent precisely which activities Lawson alleges to be "protected" for purposes of SOX or the common law. Her brief in Opposition to the Motion to Dismiss, however, identifies seven categories of protected activities.

First, she reported inaccuracies in the expenses for "Guidance Interactions," a new initiative to give investment advice to the public. She provided information about these inaccuracies to Fidelity Investments' counsel and CFO, as well as to Vice President Betty Connolly, in June 2007.

Second, she reported the improper retention of 12b-1[2] fees to Fidelity Investments General Counsel in May 2007.

Third, she challenged the methodology used by PI Finance, a group within Personal Investments, one of the three main companies in Fidelity Brokerage. In May 2007, she reported to Fidelity Investments General Counsel that stale methodology generated variances and discrepancies for the Funds, which affected Fund Profitability models.

---

[2] The term "12b-1 fees" refers to fees governed by SEC Rule 12b.1, 17 C.F.R. § 270.12b-1(b), promulgated pursuant to the Investment Company Act of 1940. If a mutual fund adviser plans to use fund assets to make payments for the marketing and distribution of fund shares, then it must comply with the specific conditions laid out in Rule 12b.1(b). Lawson's general concern appears to have been that National Financial ("NF"), a group within Fidelity Brokerage, was improperly retaining fees paid by the Funds that were designated for transferral to third-party intermediaries.

Fourth, she raised questions regarding PI Finance's switch of source system. She alleges that in March 2005, she advised her manager of discrepancies that had resulted from the use of a new source system, and that the switch to the new system had not been disclosed to or approved by the Board of Trustees.

Fifth, she questioned a methodology for allocating internet expenses. In the summer of 2005, Lawson presented findings to Senior Vice President Harris Komishane and then to Vice President of PI Finance John Cahill that PI Finance had failed to implement the methodology for this allocation, which the Board had approved in 2003.

Sixth, she reported two major errors in a methodology applied to the PI Back Office Group, which services shareholders' accounts. She reported the errors to Komishane.

Seventh, she filed complaints with OSHA.

b. Retaliation

The retaliation allegedly suffered by Lawson consists of a series of events: reduction of her performance rating from "exceeds expectation" to "proficient;" selection of another person instead of Lawson for the position of Director of the Board Support Group; charges that Lawson had failed to prepare business partners properly for a meeting with PricewaterhouseCoopers; reduction in bonus compensation;

exclusion from committee meetings regarding her OSHA complaints; denial of approval of an expense report; implication that she was involved in the improper 12b-1 fee retention; an "oral warning" for violating Fidelity Investments rules on insubordination; a statement by a supervisor that it was impossible for Lawson to continue working at Fidelity Investments; and harassing behavior by supervisor Claire Cadogan, including verbal abuse, sabotage of her work, and the imposition of an unrealistic workload.

3. Procedural History

Lawson filed SOX whistleblower complaints with OSHA on four separate dates: December 20, 2006; April 24, 2007; September 14, 2007; and November 9, 2007. In a letter on January 28, 2008, the DOL consolidated the four complaints into one. Lawson alleged unlawful retaliation in violation of the SOX provision which makes it unlawful for certain persons and entities to penalize employees for providing information about or assisting an investigation that employees reasonably believe constitute violations of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission ("SEC"), or any federal law relating to shareholder fraud. 18 U.S.C. § 1514A(a)(1).

On January 3, 2008, Lawson notified the DOL that she intended to seek review in federal court of her SOX claim. Under SOX, if the DOL has not issued a final decision on the complaint within 180 days of filing, the claimant may seek de novo review in federal district court. 18 U.S.C. § 1514A(b)(1)(B). The DOL, in its January 28 letter, notified Lawson that over 180 days had passed since she filed her first complaint, and that because of her intention to seek de novo review in federal court, the consolidated complaint before the DOL was closed. The Plaintiff filed her Complaint in this Court on March 20, 2008. After a scheduling conference for this litigation, Lawson filed the Amended Complaint on September 19, 2008, to which the Defendants have responded with the instant Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

B. Zang's Claims

1. The Parties

The Defendants in Zang's suit, here collectively referred to as Fidelity Management, are privately owned companies whose operations include the management of mutual funds. Defendant FMR LLC is the parent company of Defendant Fidelity Management & Research Company, which itself is the parent of Defendant FMR Co., Inc. As noted, FMR LLC is the successor to FMR Corp. These companies provide investment management services to a group of mutual funds ("Funds"), each of which is a publicly held investment company, registered with the SEC and required to file reports under Section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(d). A

Board of Trustees has oversight capacity for the Funds, but the Defendants perform the management and administrative functions necessary for the Funds' operation. Together, the Defendants manage approximately 350 mutual funds.

The Plaintiff began his employment for Fidelity Management in 1997. Under Zang's employment agreement, he was employed "by FMR Corp., and/or any entity which is directly or indirectly owned or controlled wholly or in part by FMR Corp." In 2001, Zang's specific employer changed from Fidelity Management & Research Company to FMR Co., Inc., and remained so until his employment was terminated in 2005.

Zang started at Fidelity Management as an equity research analyst in 1997. Between 1998 and 2005, Zang acted as a portfolio manager for several mutual funds: Fidelity Select Utilities Growth, Fidelity Select Chemicals, Fidelity Select Medical Delivery, and Fidelity Select Natural Gas. His portfolio manager duties included selecting the investment securities for the fund, communicating with outside parties about performance and investment strategies, and helping prepare or review certain shareholder reports and disclosures. During this period, Zang received positive feedback from trade publications and his superiors.

2. <u>Alleged Protected Activity and Retaliation</u>

a. Protected Activity

In February 2005, Fidelity Management internally distributed, and sent to the SEC, a draft of the revised registration statement for Fidelity Select Portfolios. Included with this statement was a revised Statement of Additional Information ("SAI"), which was to become effective in April. Zang contends he informed Fidelity Management that the SAI disclosures failed to state accurately the extent to which portfolio managers' compensation was driven by performance as research analysts providing services to other Fidelity mutual funds, rather than by performance as portfolio managers of their respective Select Funds. Zang's Complaint identifies several securities laws that he claims he reasonably believed were violated in the SAI, including Section 17(a) of the Securities Act of 1933, and Sections 15(c), 34(b), and 36(b) of the Investment Company Act of 1940. Zang further alleges that he informed Fidelity Management that its operation of the Funds created conflicts of interest that harmed the Funds' shareholders.

b. Retaliation

Zang contends that as a result of his protected activities, a Fidelity Management supervisor withdrew direction that Zang attend a Board of Trustees meeting for the Fidelity Select Medical Delivery fund.

Zang also refers to supervisor complaints of poor job performance as retaliation for his protected activities. At one point, a supervisor also informed Zang that Fidelity Management was unsure whether it wanted Zang to be a member of "the team," despite his performance during this period that outpaced other Fidelity Select fund managers.

On June 27, 2005, Fidelity Management terminated Zang's employment effective July 15. On June 30, 2005, Fidelity Management offered Zang six months of severance pay, but later rescinded the severance offer. At the same time it terminated Zang, Fidelity Management terminated the employment of two other portfolio managers, allegedly as a result of the same review that led to Zang's termination. Zang claims that these two portfolio managers, unlike him, received severance pay.

3. Procedural History

Zang filed a complaint with OSHA on September 15, 2005. The complaint alleged that the Defendants violated the SOX whistleblower provision when they discharged Zang in July 2005 as unlawful retaliation for activity protected under the statute.

OSHA dismissed the complaint, finding that although Zang was a covered employee within the meaning of the SOX whistleblower provision, 18 U.S.C. § 1514A(a), he had not engaged in protected conduct. Zang requested a hearing before an Administrative Law Judge ("ALJ"). Fidelity Management then filed a motion for summary decision on April 3, 2007, alleging that Zang was not a covered employee within the meaning of § 1514A(a), and that Zang had not engaged in protected conduct within the meaning of § 1514A(a)(1). The ALJ permitted limited discovery concerning Zang's status as a covered employee, and on March 27, 2008, issued a decision granting summary decision to Fidelity Management, and dismissing the complaint. On April 9, 2008, Zang petitioned for review of the ALJ decision by the Department of Labor's Administrative Review Board ("ARB"). However, on April 16, 2008, Zang gave notice of his intention to file an action in federal court, and proceeded to file his Complaint in this Court on May 6, 2008, thereby terminating his appeal with the ARB. The Defendants thereupon filed the Motion to Dismiss Zang's Complaint now before me.

II. STANDARD OF REVIEW

To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a complaint must allege "a plausible entitlement to relief." *Gargano v. Liberty Int'l Underwriters, Inc.,* 572 F.3d 45, 49 (1st Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly,* 127 S.Ct. 1955, 1966 (2007)). On a motion to dismiss, a court examines the record "accepting the complaint's well-pleaded facts as true and indulging all reasonable inferences in the plaintiff's favor." *Cook v. Gates,* 528 F.3d 42, 48 (1st Cir. 2008) (citing *SFW Arecibo, Ltd. v. Rodriguez,* 415 F.3d 135, 138-39 (1st Cir. 2005)).

III. ANALYSIS

Both sets of Defendants contend that the two claims in the Plaintiffs' respective Complaints-retaliation in violation of 18 U.S.C. § 1514A (Count I) and wrongful discharge in violation of public policy (Count II) – fail to state a claim upon which relief can be granted. Before turning to the Defendants' challenge based on the scope of SOX's whistleblower provision, I address at the outset a threshold challenge raised by Fidelity Management with respect to Zang's claim: that the claim is barred by the principles of collateral estoppel.

A. Is Zang Collaterally Estopped from Pursuing His Claim in Federal Court?

The vitality of Zang's SOX whistleblower claim depends on whether the principles of collateral estoppel apply to the March 27, 2008 decision by the DOL's ALJ. The procedures at issue are defined in 18 U.S.C. § 1514A(b). A claimant may bring an action for de novo review in federal district court "if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant." § 1514A(b)(1)(B). The parties dispute whether the statute permits an ALJ decision to have preclusive effect when a claimant has received an adverse ALJ decision, then appeals the decision to the ARB, and then immediately exercises his rights of de novo district court review.

The test for collateral estoppel, or issue preclusion, has four elements: (1) both proceedings involved the same issue of law or fact; (2) the issue was actually litigated in the prior proceeding; (3) the issue was resolved in a final and binding judgment; and (4) the first court's resolution of that issue was essential to its judgment. *Monarch Life Ins. Co. v. Ropes & Gray,* 65 F.3d 973, 978 (1st Cir. 1995).

When a prior judgment issues from an administrative agency, the default assumption is that issue preclusion applies to the agency judgment. *Global NAPs, Inc. v. Mass. Dep't of Telecomm. & Energy,* 427 F.3d 34, 44 (1st Cir. 2005). The Supreme Court will give preclusive effect to administrative agency decisions. *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 103, 107 (1991) ("We have long favored application of the common-law doctrines of collateral estoppel . . . to those determinations of administrative bodies that have attained finality."); *Univ. of Tenn. v. Elliott,* 478 U.S. 788, 797 (1986) (noting the "sound policy" of applying issue preclusion to the factfinding of administrative bodies "acting in a judicial capacity"); *United States v. Utah Constr. & Mining Co.,* 384 U.S. 394, 422 (1966) (holding that when an agency acts in a judicial capacity, giving parties an opportunity to litigate and resolving disputed issues of fact, the courts apply preclusion to the case). The values behind collateral estoppel – avoiding costs of repetitive litigation and conserving judicial resources – apply whether the prior factfinding was made by a state or federal agency. *Elliott,* 478 U.S. at 798.

Before applying this "federal common law of issue preclusion," however, there is a preliminary question: whether issue preclusion is inconsistent with the statute under which the claimant seeks relief. *Global NAPs,* 427 F.3d at 45 (citing *Elliott,* 478 U.S. at 796); *see also Astoria,* 501 U.S. at 108 ("[W]here a common-law principle is well established, as are the rules of preclusion, . . . the principle will apply except 'when a statutory purpose to the contrary is evident.'") (citation omitted). The framework for this analysis comes from *Elliott,* 478 U.S. 788, which involved collateral estoppel against the backdrop of Title VII. In *Elliott,* a state ALJ had determined that the University of Tennessee was not motivated by racial prejudice when it discharged the claimant. *Id.* at 791. The employee did not seek review of that decision in state court, but instead filed a new suit in federal court for violations of Title VII and 42 U.S.C. § 1983. *Id.* at 792. The Supreme Court interpreted Title VII to permit de novo review in federal court, reasoning that if under the statute, the Equal Employment Opportunity Commission ("EEOC") had authority to investigate charges previously reviewed by state and local authorities, so too did a district court. *Id.* at 795.

The First Circuit has observed "*Elliott* controls the structure of the analysis" in this context. *Global NAPs,* 427 F.3d at 45. Just as the Court in *Elliott* was required to determine whether Title VII permitted giving preclusive effect to unreviewed state administrative proceedings, the question here is whether the

Sarbanes-Oxley whistleblower provision permits giving preclusive effect to DOL administrative proceedings. *Id.* at 46.

Deciding if issue preclusion applies to the DOL'S ALJ decision therefore requires statutory interpretation of 18 U.S.C. § 1514A(b)(1)(B). I first turn to the text, "the starting point for interpretation of a statute." *Seahorse Marine Supplies, Inc. v. Puerto Rico Sun Oil Co.,* 295 F.3d 68, 74 (1st Cir. 2002) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 835 (1990)). The pertinent language is that "if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant," the claimant can pursue de novo review in federal district court. § 1514A(b)(1)(B). The statute clearly identifies three necessary criteria for de novo review in federal court: the lack of a final decision by the DOL; a 180-day waiting period after filing the complaint with the DOL; and the lack of bad faith on the part of the claimant. The DOL regulations specify several mechanisms for obtaining a final decision from the Department. The regulation relevant to this case is 29 C.F.R. § 1980.110, which deals with appeals of ALJ decisions to the ARB. The ALJ determination becomes a final decision if the claimant has *not* timely filed a petition for review with the ARB. 29 C.F.R. § 1980.110(a). The ALJ decision also becomes a final decision if the claimant has petitioned for ARB review, but the ARB has not issued an order within thirty days, notifying the parties that the case has been accepted for review. § 1980.110(b).[3] Therefore, the ALJ decision is not a final decision if (1) a claimant has timely filed a petition for ARB review, and (2) either the thirty-day deadline has not yet elapsed and the ARB has yet to take action, or the deadline has elapsed and the ARB has timely accepted the case for review.

It is clear that in this case, Zang had not obtained a final decision from the DOL at the time he filed his case in federal court. Zang obtained the ALJ's decision on March 27, 2008, and appealed that decision to the ARB on April 9. On April 16, Zang notified the DOL that he planned to file suit in federal court and indeed did so on May 6. Because the matter was on appeal to the ARB and thirty days had not yet passed, the ALJ's decision was not a "final decision" at the time that Zang filed his complaint in federal district court. The other two requirements for seeking de novo review in federal court – a 180-day waiting period and a lack of bad faith – are also satisfied. When Zang notified the ARB of his decision to pursue relief in federal court, two and a half years had passed since Zang filed his complaint at the DOL, thereby easily satisfying the 180-day waiting

[3] The regulations identify two other ways in which a determination becomes a final decision. OSHA's preliminary findings become a final decision if the claimant does not make a timely objection to these findings or the preliminary order. 29 C.F.R. § 1980.106(b)(2). If the ARB has accepted the case for review, then its determination on the merits of the case, once made, is the final decision of the Department. § 1980.110(a).

requirement. Nor do the Defendants argue that the 180-day delay resulted from bad faith on Zang's part. Here, all three of the statute's requirements, according to the plain terms of the text, had been satisfied.

A statute's plain meaning governs "unless it would produce an absurd result or one manifestly at odds with the statute's intended effect." *Seahorse Marine Supplies,* 295 F.3d at 74 (quoting *Parisi by Cooney v. Chater,* 69 F.3d 614, 617 (1st Cir. 1995)); *see also Griffin v. Oceanic Contractors,* 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with legislative purpose are available."). The Defendants suggest that allowing Zang to proceed would produce an absurd result that is inconsistent with the administrative dispute resolution procedures anticipated by the statute.

The district court in *Hanna v. MCI Communities, Inc.,* voiced similar concerns, noting that "applying the statute according to its plain meaning might indeed lead to an absurd result" in cases where a complainant files a complaint in federal court after petitioning for review by the ARB. 348 F. Supp. 2d 1322, 1329 (S.D. Fla. 2004). The Department of Labor has expressed similar concerns:

> This provision authorizing a Federal court complaint is unique among the whistleblower statutes administered by the Secretary. This statutory structure creates the possibility that a complainant will have litigated a

> claim before the agency, will receive a decision from an administrative law judge, and will then file a complaint in Federal court while the case is pending on review by the Board.

68 Fed. Reg. 31,860, 31,863 (May 28, 2003). From this, the Department of Labor concludes "that it would be a waste of the resources of the parties, the Department, and the courts for complainants to pursue duplicative litigation." *Id.*

I do not agree with these somewhat overwrought observations by *Hanna* and the Secretary of Labor that relitigating the issue in district court is either absurd or improperly duplicative. *See Stone v. Instrumentation Lab. Co.,* 591 F.3d 239, 249 (4th Cir. 2009) (finding "a literal interpretation of the statute [§ 1514A] does not lead to an 'absurd result'" and "reject[ing] as contrary to the statute the Secretary's 'suggestion' that district courts apply preclusion principles to effectuate a goal of efficiency."). The statute provides a mechanism for administrative proceedings. If the DOL cannot complete the adjudication process in a timely fashion – within 180 days – claimants can either seek review in federal court, or can first pursue further administrative review. To be sure, this may lead to duplication of factfinding by the DOL and the federal courts, but that repetition was clearly contemplated as possible by the statute's general provision for "de novo review." *See id.* at 250 (rejecting "the Secretary's interpretation and invitation to district courts to apply preclusion principles because Congress expressly provided for *de novo* non-deferential review in district court"). And of course, it is entirely within the DOL's control to preclude a claimant from filing in federal court and to avoid the duplication of factfinding – namely, by issuing a final decision within 180 days of the filing of the complaint.

Any charges of absurdity are further undermined when one considers similar outcomes under other federal statutes. In the employment context, if 180 days have passed since an employee has filed a discrimination charge with the EEOC, and the EEOC has yet to file a civil action, then the employee can seek de novo review in federal district court. 42 U.S.C. § 2000e-5(f)(1). Likewise, a federal employee whose discrimination case has been reviewed by the Merit Systems Protection Board can obtain review in federal district court. 5 U.S.C. §§ 7702, 7703(b)(2). Outside the employment context, a claimant can seek de novo review of a revocation of a federal firearms license by the Bureau of Alcohol, Tobacco, Firearms and Explosives, where the Attorney General has affirmed the revocation after a hearing. 18 U.S.C. § 923(f)(3). The same opportunity is provided if a naturalization application is denied, and a senior immigration examiner upholds the denial after an administrative hearing. 8 U.S.C. § 1421(c).

In light of these statutes, the text of SOX, and the DOL's own procedural mechanisms, I find that it would not be absurd to permit Zang to proceed with his federal claim. A necessary requirement of collateral estoppel is that the adjudication body "actually resolved the issue in a final and binding judgment." *Monarch Life Ins.,* 65 F.3d at 978. The ALJ determination here was on appeal for review by the ARB, and therefore his decision dismissing the Plaintiff's complaint was not final. I therefore conclude that for the purposes of § 1514A(b), the principles of collateral estoppel do not apply to ALJ decisions when those decisions are on appeal to the ARB and more than 180 days have passed since the initial filing of the complaint with the Department.

B. Were Lawson and Zang Covered Employees Under the Sarbanes-Oxley Act?

The Defendants contend that Lawson and Zang, as employees of privately held companies, are not covered by the SOX whistleblower provision. For their part, Lawson and Zang argue that the statute encompasses not only employees of public companies but also employees of private companies, particularly those that act as investment advisers to public investment companies. Resolution of this dispute requires interpretation of § 1514A(a), and again I begin with the text.

1. <u>The Text of § 1514A(a)</u>

The whistleblower provision identifies both employers whose retaliation is prohibited and employees whose conduct is protected. The subsection in question states as follows:

> 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)), 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
>
> (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.

§ 1514A(a) (emphasis added). The parties do not dispute that "an employee" includes an employee of a public company, i.e., one with a class of securities registered under Section 12 of the Securities Exchange Act or one that files reports with the SEC. But the Plaintiffs argue that "an employee" also includes employees of "any officer, employee, contractor, subcontractor, or agent of such company."

The statutory text is far from pellucid.[4] The statute protects "an employee," but does not directly state

[4] Courts as well as commentators have criticized SOX as "hastily passed and poorly drafted." *In re Enron Corp. Sec. Litig.,* No. MDL-1446, 2004 WL 405886, at *11 (S.D. Tex. Feb. 25, 2004); *In re Adelphia Comm'cns Corp.,* No. 03-MD-1529, 2005 WL 1278544, at *5 n. 8 (S.D.N.Y. May 31, 2005); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance,* 11 YALE L.J. 1521, 1549-68 (2005) (discussing the narrow time frame in which the legislation was

(Continued on following page)

at which entity the individual must be employed. I therefore interpret the word "employee" by reference to the rest of the language in the subsection. *See Gustafson v. Alloyd Co.,* 513 U.S. 561, 575 (1995) (describing the doctrine of *nascitur a sociis,* whereby a word is known by the words with which it is associated). This requires choosing between two interpretations: the Defendants' reading ("an employee of a publicly traded company"), or a more expansive reading ("an employee of a publicly traded company or of any officer, employee, contractor, subcontractor, or agent of such company"). The Plaintiffs contend that the statute uses broad, plain language protecting an employee without regard to whether he is employed by the public company or the contractor. Fidelity

---

developed); Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002,* 76 ST. JOHN'S L.REV. 671, 672 (2002) (observing that speedy drafting resulted in a disorganized statute). *But see SEC v. Worldcom, Inc.,* No. 02 Civ 4963(JSR), 2003 WL 22004827, at *17 & n. 43 (S.D.N.Y. Aug. 26, 2003) ("While Sarbanes-Oxley has been criticized in some quarters, there can be no doubt that it addresses some of the very problems presented by this Company's history. . . . As with other major legislation covering significant new territory, there are provisions of Sarbanes-Oxley that will benefit from either clarifying regulations or from exemptive actions.").

For instance, ambiguity has emerged as to the statute of limitations in Section 804, *Lieberman v. Cambridge Partners, LLC,* 432 F.3d 482, 489 (3d Cir. 2005), and as to the statute's retroactive application. *In re ADC Telecomms., Inc. Sec. Litig.,* 409 F.3d 974, 977 (8th Cir. 2005) (concluding that a "literal reading of the Sarbanes-Oxley Act's effective-date clause would lead to a puzzling result").

Investments has suggested that such a construction is linguistically nonsensical because it would require the words "any officer, employee, contractor, subcontractor, or agent" to serve two functions: subject (those who cannot discriminate) and object (those who cannot be discriminated against). This attempt at a grammatical attack is not persuasive. Under the Plaintiffs' construction, the subject and object of the sentence would be distinct groups: the subject would be a "publicly held company" or its "officer, employee, contractor, subcontractor, or agent," while the object of the sentence would be the "employee" of one of these discriminating entities. While the entities in the former group perform two conceptual functions – as discriminating entities, and as employers of protected individuals – this does not mean they serve two *grammatical* functions.[5]

I next consider whether either interpretation makes better logical sense. The statute contains a list of potential defendants (a public company, officer, employee, etc.), a list of prohibited actions (discharge, demotion, suspension, threat, harassment, discrimination), and a definition of the covered employees (employed by either a public company, or a public

[5] I note further that even if the Defendants' grammatical argument were persuasive, it would be equally damaging to the Defendants' own construction – "employee of a public company." Under this reading, "public company" would refer both to the subject of the sentence, as the discriminating entity, and to the employer of the protected individual.

company and its related entities, depending on one's reading of the statute). Such variables create a web of potential relationships between the public company, the entities acting on the company's behalf, the conduct involved, and the employees protected by the statute.

Given this potential complexity, I find that both of the opposing interpretations suggest somewhat awkward applications to various business relationships. For example, under the Plaintiffs' reading, the statute would protect an *employee of an employee* of a public company, and an *employee of an officer* of a public company. Fidelity Investments suggests that it would be nonsensical for a public company's officers or employees also to have their own employees. This suggestion perhaps overstates the feasibility of such an arrangement; one could imagine, for example, an officer or employee of a public company with a personal assistant, not employed by the public company, who has access to information about potential corporate fraud. Nevertheless, Fidelity Investments is correct that the statute's suggestion of the potential for such convoluted arrangements should give one pause in fashioning a manageable definition when construing the statute.

On the other hand, the Defendants' own proffered construction also has a puzzling application. Under this reading of the statute, no contractor or subcontractor is permitted to "discharge, demote, [or] suspend" an employee of a public company. It is difficult to think of circumstances that would, in any event, enable a subcontractor to discharge, demote, or suspend the employee of a public company, an entity with presumably no direct relationship to the very subcontractor executing the discharge.

Under either construction, then, few circumstances would permit all of the potential defendants to be capable of engaging in all of the prohibited activities against the covered employees. One should not conclude from the potential for awkward applications that either opposing construction should be rejected. Rather, one can conceive that under the statute, at least one prohibited activity and one category of covered employees – but not necessarily all activities and covered employees – correspond to at least one of the potential defendant entities.

Given their comparable feasibility as grammatical and logical constructions, neither of the opposing interpretations can be ruled out. Decisional law has done little to enlighten the issue. In *Rao v. Daimler Chrysler Corp.,* No. 06-13723, 2007 WL 1424220 (E.D. Mich. May 14, 2007), the plaintiff was an employee of a private company that was a "thrice-removed" subsidiary of a public company. *Id.* at *1. The court made reference to the political backdrop of the enactment of SOX and speculated that Congress's widespread concerns about accounting fraud might suggest "the inclusion of a public company's subsidiaries within SOX's whistleblower protection provision." *Id.* at *4. In the end, however, the *Rao* court concluded it could not escape the text of the statute: "[T]he fact remains that Congress only listed employees of public companies as protected individuals under § 1514A, and it is not the job of this Court to rewrite clear statutory text." *Id.* The *Rao* holding is not itself without ambiguities. Early in the opinion, the court offered as a summary that "employees of entities with certain relationships to publicly traded companies, including agents of such companies, receive whistleblower protection under § 1514A as well."[6] *Id.* at *3.

A narrow reading of the proper scope of Section 806 is shared by other federal district courts and is found in DOL administrative decisions.

In *Brady v. Calyon Sec.* (*USA*) *Inc.,* 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005), the court found that § 1514A did not cover an employee of a privately held broker-dealer that allegedly acted as an "agent and/or underwriter" for public companies. The court held that "as an employee of non-publicly traded companies, Brady [the employee] is not covered by Sarbanes-Oxley." *Id.* at 319. "Nothing in the Act

---

[6] The issue was raised but not decided by the First Circuit in *Carnero v. Boston Scientific Corp.,* 433 F.3d 1 (1st Cir. 2006). *Carnero* involved an employee of a private company, which was a subsidiary of a publicly held corporation. *Id.* at 2. The issue on appeal was whether Section 806 of SOX had extraterritorial effect, but the court briefly discussed its applicability to employees of privately held subsidiaries. "An individual complaining under this section of the Act must . . . ordinarily be . . . an 'employee' of a publicly traded company subject to the Act." *Id.* at 5. However, because neither party contested the plaintiff's status as a covered employee, the First Circuit merely assumed his covered status without deciding the issue. *Id.* at 6.

suggests that it is intended to provide general whistleblower protection to the employees of any employer whose business involves acting in the interests of public companies." *Id.* at 318; *see also Malin v. Siemens Med. Solutions Health Servs.,* 638 F. Supp. 2d 492, 500-01 (D. Md. 2008) ("[T]o hold that non-public subsidiaries are subject to the whistleblower protection provisions simply because their parent company is required by other SOX provisions to report the subsidiary's financial information or to adopt an umbrella compliance policy would widen the scope of the whistleblower protection provisions beyond what Congress appears to have intended."). In a footnote, the *Brady* court cites DOL ALJ opinions it considered to illustrate the "proper application" of the "agency" provision, focusing on those involving non-public companies that direct and control the employment decisions for the public company. *See id.* at 318 n.6.

ALJs within the Department of Labor who have addressed this issue have reached similar conclusions. In *Goodman v. Decisive Analytics Corp.,* No. 2006-SOX-11 (ALJ Jan. 10, 2006), the ALJ determined that limiting whistleblower protection to employees of publicly traded companies was necessary in order to limit the scope of Section 806: "Any other interpretation would extend SOX employee protection far beyond the applicability envisioned by Congress since any private business conducting any contractual transaction with a publicly traded company would be subject to SOX employee protection provisions." *Id.* at 6. In *Zang v. Fidelity Mgmt. & Research*

Co., No. 2007-SOX-00027 (ALJ Mar. 28, 2008), involving the Plaintiff in this case, the ALJ concluded in a decision I have found does not have preclusive effect, *see* Section III.A. *supra,* that "[h]ad Congress intended such an expansive application of Sarbanes-Oxley's whistleblower provision it would have plainly said as much." *Id.* at 7-8; *see also Minkina v. Affiliated Physician's Group,* No. 2005-SOX-00019, at 6 (ALJ Feb. 22, 2005) (concluding that nothing in the statute's language or legislative history suggests that Congress intended to bring the employees of non-public entities under the protection of Section 806).

The ARB of DOL has yet to provide the ALJs with definitive clarification on these matters. In *Kukucka v. Belfort Instrument Co.,* No. 06-104 (ARB Apr. 30, 2008), the claimant's employer, Belfort, was a private company that Kukucka argued was reliant on SunTrust, a publicly traded bank. The ARB stated that "[b]y its terms the SOX provides protection against retaliation only to employees of [public] companies." *Id.* at 4. But when the ARB ultimately dismissed Kukucka's claim, it did so not because Kukucka failed to show that his employer was a public company, but rather because he "offered no evidence to the ALJ that [Belfort's reliance on the public company] was equivalent to being a contractor, subcontractor, or agent of SunTrust." *Id.*

In another ARB case, *Klopfenstein v. PCC Flow Techs. Holdings, Inc.,* No. 04-149 (ARB May 31, 2006), the employee-claimant worked for a company that was a subsidiary (several times removed) of a publicly traded company. *Id.* at 2. The ARB decided that an employee of a subsidiary, acting as an agent of a publicly traded company, could be protected from retaliatory actions by the subsidiary. *Id.* at 9. The *Klopfenstein* decision turned on agency theory, and involved the complex task of identifying at what point a far-removed subsidiary becomes the agent of its parent corporation. Nevertheless, underlying this analysis in *Klopfenstein* was the assumption that if a subsidiary is indeed acting as an "agent," then the subsidiary's employees are covered by Section 806. The ARB does not explain the reason for making this assumption, and engages in no analysis of the statute's language or purpose with respect to which categories of employees are covered. This omission leaves me with little reason to find this particular analysis persuasive.

These opinions have engaged in little thorough discussion of the text of the statute and the different meanings that the word "employee" could bear. Left with the plain text of the statute, I find that the meaning of "employee" in § 1514A(a) is ambiguous. I therefore turn to other considerations to provide further guidance.

2. The Title and Other SOX Provisions

I approach cautiously Defendants' argument that the provision's title, "Whistleblower Protection for Employees of Publicly Traded Companies," 18 U.S.C. § 1514A, supports their position. According to the

Defendants, the title is evidence that "an employee" is limited exclusively to employees of publicly traded companies. A statutory heading, however, is "but a short-hand reference to the general subject matter involved." *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.,* 331 U.S. 519, 528 (1947). The heading of the whistleblower provision could conceivably also act as shorthand for more complicated clauses and concepts in the statute's actual text. A section heading thus "cannot limit the plain meaning of the text." *Id.* at 529. But *Brotherhood* advises that headings "are of use . . . when they shed light on some ambiguous word or phrase," and are tools "for the resolution of a doubt." *Id.* Because the phrase "an employee" only indirectly identifies the employer in question, requiring this court to engage in some grammatical reconstruction, there is arguably doubt as to the scope of the word "employee." *See Immigration & Naturalization Serv. v. Nat'l Ctr. for Immigrants' Rights, Inc.,* 502 U.S. 183, 189 (1991) (holding that a generic reference to "employment" in the statute's main text was in fact limited to "unauthorized employment," a phrase that appeared in the provision's heading). The heading of the SOX whistleblower provision, though of limited use in statutory interpretation, adds some support to the Defendants' proposed construction.

But this support is limited. If Section 806 protected not only employees of publicly traded companies, but also employees of their related entities, it would still be reasonable to use the shorthand

"Employees of Publicly Traded Companies" in the section's heading, given that even under the Plaintiffs' reading, all protected employees would have some connection to public companies, even if indirectly. The rationale for the shorthand is even more compelling when one considers that the alternative heading would have been "Employees of Publicly Traded Companies and Their Related Entities," or worse, "Employees of Publicly Traded Companies, Their Officers, Employees, Contractors, Subcontractors, or Agents." This contrasts with *National Center for Immigrants Rights,* where the alternative heading would have merely used the relatively concise phrase "Authorized and Unauthorized Employment" rather than "Unauthorized Employment," thereby weakening any claim that the heading functioned as a mere shorthand. *See Nat'l Ctr. for Immigrants' Rights,* 502 U.S. at 189.

Another consideration is the treatment of company-related entities in other provisions of SOX. Section 307, for instance, discusses the obligation of attorneys to report evidence of a material breach of securities law or a breach of a fiduciary duty by a company or its agent. 15 U.S.C. § 7245. The provision states explicitly that these rules apply to "attorneys appearing and practicing before the Commission *in any way* in the representation of issuers." § 7245 (emphasis added). This definition could indicate that Congress was aware of how to broaden the scope of individuals affected by the statute, and chose to do so in Section 307, and did not choose to do so in Section 806.

On the other hand, one could also infer from Section 307 that Congress knew how to define the scope of the affected persons in the provision, and neglected to provide such definition – whether narrow or broad – to the scope of employees protected by Section 806. I find that the other SOX provisions provide limited insight as to the scope of Section 806.

3. Legislative History

Given the ambiguity of the text, I may turn to legislative history to shed light on the statute's meaning. *United States v. Commonwealth Energy Sys. & Subsidiary Cos.,* 235 F.3d 11, 16 (1st Cir. 2000). But the legislative history on this provision of SOX is notably unhelpful in answering the particular question before me because the congressional debates do not speak directly to whether employees of privately held companies can be covered by the whistleblower provision.

For instance, the Senate Judiciary Committee's Report on Sarbanes-Oxley states that Section 806 "would provide whistleblower protection to employees of publicly traded companies." S. REP. NO. 107-146, at *13 (2002). It is unclear whether this constitutes a statement that employees of non-public companies are specifically excluded, or are instead limited shorthand generalizations about Section 806. Similarly, in Senator Sarbanes's introduction to the Senate Conference Report, he stated that the Act "applies exclusively to public companies," *see* 148 Cong. Rec. S7350, 7351 (July 25, 2002) which could mean that it applies to public companies and those parties that act on their behalf (such as officers, employees, and contractors), rather than to private companies that provide no services to public companies at all.

The Senate Report also describes the consequences that would occur "[i]f the *employer* does take illegal action in retaliation for lawful and protected conduct." S. REP. NO. 107-140 at *13 (emphasis added). If the Defendants are correct that Section 806 protects only employees of publicly traded companies, then the term "employer" here must refer exclusively to publicly traded companies. The status of other non-public entities as *employers* would be irrelevant because as their actions against their own employees would not be covered. But it then becomes unclear why the Report's language would use the term "employer" at all, given that the other non-public entities – even though not acting as employers – are also prohibited from engaging in retaliatory conduct.

In short, the particular phrases used in the legislative history of Section 806 provide little guidance on the scope of the covered employees.[7] What is

---

[7] The Defendants also make reference to a piece of legislation that never became law, the Mutual Fund Reform Act, S. 2059, 108th Cong. § 116(b) (2004). This bill, which would have extended whistleblower protection to employees of investment advisers explicitly, provides no reliable guidance here. *United States v. Craft,* 535 U.S. 274, 287 (2002) ("[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. . . .").

helpful, however, is evaluating the purpose of Sarbanes-Oxley more generally, which was "to prevent and punish corporate fraud, protect the victims of such fraud, preserve evidence of such fraud and crime, and hold wrongdoers accountable for their actions." S. REP. NO. 107-146, at *1 (2002). The fraud targeted by the statute was fraud involving public companies. *Id.* at *10 ("Congress must act now to restore confidence in the integrity of the public markets. . . ."). When Senator Sarbanes stated that the provision "applies exclusively to public companies," he may not have shed light on the definition of "employee," but he did indicate the focus of the statute, including Section 806. 148 Cong. Rec. S7350, 7351 (July 25, 2002).

When considering whether a particular interpretation of Section 806 leads to any problematic application that would run counter to this purpose, I find that the two interpretations diverge. The Plaintiffs' reading might permit the SOX whistleblower provision to have a notably expansive scope untethered to the purpose of the statute. Any employee of an entity that acts as an officer, employee, contractor, subcontractor or agent of a public company, who involves himself in the reporting of fraud by his own employer, would be a covered employee. This reading suggests that an employee could be protected even when his whistleblowing does not directly involve fraud against public shareholders. The Plaintiffs maintain that this application would be narrowed by the fact that Section 806 only protects those whistleblowing activities directed to the protection of shareholder interests.

But the language of the statute itself does not plainly provide such a limiting principle, cabining its scope in the manner suggested by the Plaintiffs.

The only possible limitation I can find is in the phrase "relating to fraud against shareholders." The statute protects employees who report activities that may constitute "a violation of [18 U.S.C.] 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. § 1514(a)(1) (emphasis added). There is arguably some ambiguity here as to whether "relating to fraud against shareholders" modifies (1) the phrase "any provision of federal law," or instead (2) the entire clause, "a violation of [18 U.S.C.] section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law." If the latter, then each of the six categories of possible violations would have to relate to fraud against shareholders, providing the limiting principle necessary to keep the Plaintiffs' construction from expanding beyond the purpose of SOX.

Principles of statutory construction direct courts to construe a statute such that no word is superfluous, *Duncan v. Walker,* 533 U.S. 167, 174 (2001), and to "give all language in a statute operative effect." *Morales v. Sociedad Espanola de Auxilio Mutuo y Beneficencia,* 524 F.3d 54, 59 (1st Cir. 2008). If the phrase "relating to fraud against shareholders" did not modify "any provision of Federal law," one could argue that this would render the listing of the five other statutory and regulatory categories superfluous. After all, the statute could have protected just reasonable belief in a "violation of any federal law relating to fraud against shareholders," without citing any particular statutes or regulations.

As one district court has observed, the few courts that have asked whether the violations enumerated in § 1514A are limited by the phrase "relating to fraud against shareholders" have not been consistent. *O'Mahony v. Accenture Ltd.,* 537 F. Supp. 2d 506, 516 (S.D.N.Y. 2008) (citing cases). The court in *O'Mahony,* after a thorough discussion of the statutory text, concluded that the phrase modified only the clause "any provision of federal law." *Id.* at 517. The alternative construction, whereby the phrase would modify all six categories of statutes and regulations, violates the "doctrine of the last antecedent." *Id.* This doctrine states that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas,* 540 U.S. 20, 26 (2003). To be sure, this is not an "absolute" rule, *id.,* but here it may prove useful if there are no countervailing indications that the phrase modifies each of the covered violations.

In the case of Section 806, however, there are in fact indications that a relation to shareholder fraud is imperative for each of the six categories of violations listed. The legislative history makes clear that Congress passed SOX to address the problems of shareholder fraud that had gone unreported in the past –

not to address any and all infractions committed by a public company or its related entities giving rise to actions under the six categories of violation. According to the Senate Report, "[a]lthough current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle *on fraud and protect investors.*" *See, e.g.,* S. REP. NO. 107-146, at 19 (2002) (emphasis added).

The Fourth Circuit came to the same conclusion in *Livingston v. Wyeth, Inc.,* 520 F.3d 344 (4th Cir. 2008), when faced with the question of whether the fifth category of violations, "any rule or regulation of the Securities and Exchange Commission," had to be related to fraud in order to trigger whistleblower protection. *Id.* at 351 n.1. The court decided that even though the text of the statute was ambiguous as to which violations were modified by the phrase "relating to fraud against shareholders," the limitation had to apply to SEC rules and regulations as well:

> To conclude otherwise would absurdly allow a retaliation suit for an employee's complaints about administrative missteps or inadvertent omissions from filing statements. Moreover, the ambiguity is fully clarified by the context of the whistleblower provision in the Sarbanes-Oxley Act and by the legislative history that indicates that

> whistleblowing is protected by § 1514A when it relates to "fraud."

Id.

Likewise, I find that to come within the scope of Sox when an employee provides information about conduct that he reasonably believes constitutes a violation of the categories of law and regulations listed in 18 U.S.C. § 1514A(a)(1), this whistleblowing activity must "relat[e] to fraud against shareholders." Consequently, protecting employees of a public company's related entities would not result in an overly broad application of the statute that would be counter to the statute's purpose. I am left then with a compelling limiting principle for the Plaintiffs' reading of the statute.

The Defendants' construction, while not inconsistent with the text, would result in an excessively forced and formalistic reading. The legislative history indicates that Congress was concerned with failures to report instances of fraud against shareholders, failures not only on the part of public company employees, but also employees of those institutions working with the public company. The Senate Report, discussing the collapse of Enron, observed that "Enron apparently, *with the approval or advice of its accountants, auditors and lawyers,* used thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron's stock price." S. REP. NO. 107-146, at *2 (2002) (emphasis added). The Report goes on to state that "when corporate employees at both Enron and Andersen attempted to report or 'blow the whistle' on fraud, but they were discouraged at nearly every turn." *Id.* at *5. The legislative history of SOX makes clear that Congress was concerned about the related entities of a public company becoming involved in performing or disguising fraudulent activity, and wanted to protect employees of such entities who attempt to report such activity.

The Defendants' strongest argument in terms of legislative purpose seems to be that the Plaintiffs' construction would extend the statute to an unbounded and vague scope of protected individuals. But because my construction of the statute protects only that whistleblowing activity that relates to fraud against shareholders, I find the Defendants' concerns unfounded.

4. <u>DOL Regulations</u>

Another potential source on the meaning of Section 806 is a regulation issued by OSHA defining "employee" as "an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative." 29 C.F.R. § 1980.101. In promulgating the regulation, OSHA commented that this definition of "employee" is consistent with Section 806(a) because the statute "protects the employees of publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies." *Procedures for the Handling of Discrimination Complaints Under Section 806,* 69 Fed. Reg. 52104, 52106 (Aug. 24, 2004).

Where a statute is ambiguous, as I have determined Section 806(a) to be, an agency's regulations may merit deference under *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.,* 467 U.S. 837, 843-43 (1984). But to justify such deference, Congress must have delegated authority to the agency to interpret the statute, and the agency must have invoked that authority. *United States v. Mead Corp.,* 533 U.S. 218, 226-27 (2001); *Navarro v. Pfizer Corp.,* 261 F.3d 90, 99 (1st Cir. 2001).

I find no provision of SOX that delegates rule-making authority to OSHA or the Department of Labor, although a provision of the act explicitly delegates such authority to the SEC. 15 U.S.C. § 7202(a). OSHA did not invoke any authority to interpret the statute in promulgating 29 C.F.R. § 1980.101. Moreover, OSHA summarized the rule as establishing "the procedures and time frames for the handling of discrimination complaints" under SOX. 69 Fed. Reg. 52,104, 52,104. OSHA goes on to state that "[t]hese rules are procedural in nature and are not intended to provide interpretations of the Act." *Id.* at 52,105. OSHA was apparently defining the terms used in its own regulations for the procedures involved in Section 806 complaints. OSHA's regulation and comments do not constitute an exercise of authority to interpret the statute, and warrant no deference under *Chevron.*

If an agency's interpretation of a statute has no claim to *Chevron* deference, then it merits respect insofar as it is has the "power to persuade." *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944); *Mead,* 533 U.S. at 234. The weight given to an agency's judgment "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking in control." *Skidmore,* 323 U.S. at 140.

There is little indication here of the thoroughness of OSHA's consideration of the meaning of "employee." OSHA's general approach is not a model of administrative consistency. The regulation is, after all, inconsistent with determinations made by ALJs and the ARB when applying Section 806 to particular claimants. *See, e.g., Goodman,* No. 2006-SOX-11, at 6; *Zang,* No. 2007-SOX-00027, at 7-8; *Minkina,* No. 2005-SOX-00019, at 6. I nevertheless have concluded that the reasoning underlying the interpretation is valid, given the purpose of the statute and the plausible reading of the text, *see* Part III.B.1-3 *supra.* However, OSHA's interpretation of "employee," standing alone, is not particularly persuasive under *Skidmore,* despite the fact that it is consistent with my own reading of the statute's text and purpose.

5. Application to Investment Advisers for Mutual Funds

Having determined that Section 806 protects employees of any related entity of a public company, the final step in the analysis is to determine whether Lawson and Zang fall into this category. To do so, the Plaintiffs' employer must be an "officer, employee, contractor, subcontractor, or agent," or rather, have a plausible claim to being one of these entities.

Lawson and Zang have sufficiently pleaded facts indicating that the Defendants are either contractors, subcontractors, or agents of publicly held investment companies. The Plaintiffs' employers perform a wide variety of administrative and executive tasks for the Funds, including making fundamental decisions as to how the Funds' assets will be invested. If the Funds did not have investment advisers as their agents, the only activity that could take place on the Funds' behalf would be actions taken by the Board of Trustees. Indeed, the unique relationship between mutual funds and their investment advisers has often been noted by the courts. *See Daily Income Fund v. Fox,* 464 U.S. 523 (1984); *Burks v. Lasker,* 441 U.S. 471 (1979). Mutual funds are supervised and operated by separately owned organizations, the investment advisers. *Daily Income Fund,* 464 U.S. at 536; *Burks,* 441 U.S. at 481. Because of the "potential conflicts of interest" created by this close relationship, *Daily Income Fund,* 464 U.S. at 536, Congress has imposed a fiduciary duty on investment advisers and managers with regards to compensation paid by the investment company. 15 U.S.C. § 80a-35(b); *see Yameen v. Eaton Vance Distribs., Inc.,* 394 F. Supp. 2d 350, 354 (D. Mass. 2005). This fiduciary duty remains subject to oversight by the courts, although the particular role of the courts in the enforcement process continues to be refined, as demonstrated by the issues raised in a case decided today by the Supreme Court, *Jones v. Harris Assocs. L.P.,* 2010 WL 1189560 (U.S. March 30, 2010) *rev'g* 527 F.3d 627 (7th Cir. 2008).[8]

---

[8] The question addressed by the Supreme Court in *Jones v. Harris Assocs., L.P.,* 2010 WL 1189560 (U.S. Mar. 30, 2010) is the deference owed to the decisions of a mutual fund's board regarding the level of fees paid to its investment adviser, pursuant to Section 36(b) of the ICA, 15 U.S.C. § 80a-35(b). As the competition between mutual funds has increased, some courts have become more reluctant to interfere with an investment company's compensation for investment advisers, on the assumption that market forces will help prevent advisers' fees from becoming excessive or disproportionate. *See Jones v. Harris Assocs. L.P.,* 527 F.3d 627, 633 (7th Cir. 2008) (noting that "[a] lot has happened in the last 38 years" and that the market for mutual funds is more competitive, and presumably less prone to abuse) *rev'd,* 2010 WL 1189560 (U.S. Mar. 2010). Other observers, however, have underscored the pervasive "structural impediments to arm's-length bargaining" between fund and adviser, justifying continued caution over the extent to which a fund's board becomes "captive" to the fund's investment adviser. Brief for United States as Amicus Curiae Supporting Petitioners at 12, *Jones v. Harris Assocs. L.P.,* No. 08-586 (U.S. June 15, 2009). What is clear from the Supreme Court's decision today in *Jones v. Harris Assocs. L.P.* is that courts must continue to respond to both the structural and circumstantial factors that affect the degree of independence between mutual fund and investment adviser.

These dimensions to the mutual fund industry inform my treatment of this case. For the goals of SOX to be met, contractors and subcontractors, when performing tasks essential to insuring that no fraud is committed against shareholders, must not be permitted to retaliate against whistleblowers. These concerns are especially strong for mutual funds, which have no employees and implement the funds' management through contractual arrangements with investment advisers. If Section 806 only protected employees of public companies, then any reporting of fraud involving a mutual fund's shareholders would go unprotected, for the very simple reason that no "employee" exists for this particular type of public company. I find that Lawson and Zang, as employees of investment advisers to mutual funds, are covered by Section 806.

I will briefly touch on the Plaintiffs' alternative statutory argument regarding the special status of mutual funds. Apart from the argument that investment advisers have contracts with public companies, Zang, in particular, presses "the very narrow argument that investment advisers and sub-advisers to public investment companies are themselves covered under Section 806." Even if the statute does not cover employees of non-public entities more generally, the Plaintiffs contend courts have applied Section 806 to employees of companies that act on behalf of publicly held affiliates and that are almost inseparable from them.

Case law and federal regulations have described the singular importance of the investment adviser in managing mutual fund affairs. *See Tannenbaum v. Zeller,* 552 F.2d 402, 405 (2d Cir. 1977) ("Control of a mutual fund . . . lies largely in the hands of the investment adviser."); Investment Company Act Release No. 24082 (Oct. 14, 1999), 64 Fed. Reg. 59,826, 59,827 (Nov. 3, 1999) ("[I]nvestment advisers typically dominate the funds they advise."). According to Zang, "all or substantially all" of Fidelity Management's activities are performed on behalf of the Funds, and all of the Funds' "day-to-day" functions and decisions are made by Fidelity Management. The Funds and Fidelity Management are thus "inextricably intertwined." The implication of this argument is that any employment action taken by Fidelity Management can be attributed to the Funds, and is therefore covered by SOX.

Because I have concluded that employees of agents, contractors, and subcontractors of public companies are protected by Section 806, and because investment advisers to mutual funds fall in this category of employees, I need not reach this alternative statutory argument proffered by the Plaintiffs. But I will note that Zang's characterization of mutual funds and their investment advisers runs counter to the overall legal framework for mutual funds, as defined by the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.,* and the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.* This framework defines investment companies and investment advisers distinctly, *see* 15 U.S.C. § 80a-3(a)(1), (11), and identifies their interests as distinct. *See* 15 U.S.C. § 80a-1(b)(2) (stating that the public interest and investors are harmed when investment companies are organized in the interest of investment advisers). This legal distinction is in keeping with case law on liability for securities law violations. In *In re Fidelity/Micron Sec. Litig.,* 964 F. Supp. 539 (D. Mass. 1997), the issue was whether a mutual fund shared primary liability, under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a), for statements made by FMR Corp. Judge Stearns concluded that FMR Corp., through contractual delegation, was responsible for all of the mutual fund's trading decisions and communications; consequently, the statements of the investment adviser's employees could not be imputed to the mutual fund. *Id.* at 544. Given the legal distinctions between mutual funds and the companies that provide investment services to them, I find unpersuasive the argument that the employees of these investment services companies are intertwined with and indistinguishable from mutual funds.

C. Do the Allegations Satisfy the Requirements of § 1514A?

Fidelity Investments and Fidelity Management make the additional contention that even if Lawson and Zang were covered "employees" for purposes of 18 U.S.C. § 1514A(a), they nonetheless failed to engage in protected activity under § 1514A(a)(1). The

Defendants argue that Lawson and Zang failed to satisfy the "reasonable belief" requirement, and failed to communicate with sufficient particularity their suspicions of fraudulent activity.

1. <u>The Meaning of Reasonable Belief</u>

The whistleblower provision protects employees who provide information "which the employee reasonably believes constitutes a violation" of federal laws and SEC rules covered by the statute. 18 U.S.C. § 1514A(a)(1). The First Circuit has recently concluded that the term "reasonable belief" has both a subjective and objective component. *Day v. Staples, Inc.,* 555 F.3d 42, 54 (1st Cir. 2009).

To demonstrate an objectively reasonable belief, the plaintiff does not need to cite a particular code provision, but the plaintiff "must show that his communications to the employer *specifically related* to one of the laws listed in § 1514A." *Id.* at 55 (emphasis added); *see also Platone v. U.S. Dep't of Labor,* 548 F.3d 322, 327 (4th Cir. 2008) (concluding that a plaintiff must state with sufficient particularity why she believes the actions would violate securities laws and constitute fraud). In other words, the employee's theory of fraud "must at least approximate the basic elements of a claim of securities fraud." *Day,* 555 F.3d at 55; *cf. O'Mahony,* 537 F. Supp. 2d at 517 (stating that § 1514A protects a whistleblower's reporting of fraud "under any of the enumerated statutes regardless of whether the misconduct relates to 'shareholder' fraud"). A disagreement with management about a company's internal procedures is not actionable. *Day,* 555 F.3d at 56.

2. Lawson's Allegations

I find that the Plaintiffs have alleged facts concerning reasonable belief sufficient to survive a motion to dismiss. In the case of Lawson, she has alleged that she had a reasonable belief that her employers were facilitating fraud against mutual fund investors. For example, she has alleged that she believed a group within Fidelity Brokerage had improperly retained $10 million in 12b-1 fees paid by the Funds. Federal securities laws regulate the payment of 12b-1 fees, and taking Lawson's allegations as true, her belief that Fidelity Brokerage's retention of fees constituted a securities violation could have been both objectively and subjectively reasonable. She has also alleged that her employer provided incorrect information to the Funds' Board of Trustees that had a relation to the Funds' contracts with Fidelity Investments. Section 15 of the ICA obligates the investment adviser to provide a mutual fund's board of trustees with the information necessary to evaluate the terms of an investment adviser contract, 15 U.S.C. § 80a-15(c), and Lawson may have had a reasonable belief that Fidelity Investments was violating this provision. The Defendants have challenged the objective and subjective reasonableness of Lawson's beliefs, but I am satisfied that Lawson's pleadings have alleged sufficient facts to support her belief that fraudulent activity may have been taking place.

Fidelity Investments challenges the sufficiency of her pleadings on two additional bases. First, the Defendants argue that Lawson has not alleged any reports that "specifically related" to one of the six categories of violations listed in the statute. *Day,* 555 F.3d at 55. Lawson has alleged, however, that she reported her concerns about the improper 12b-1 fee retention to Vice President Komishane (Am. Compl. ¶ 37.1), and reported her concerns regarding the inaccurate reports that were allegedly made to the Board of Trustees (Am. Compl. ¶ 54). Generalized complaints or complaints of administrative missteps are not protected activity. *See Livingston,* 520 F.3d at 352 n. 1 (commenting that Section 806 does not protect the reporting of "administrative missteps and inadvertent omissions"); *Harvey v. Home Depot USA, Inc.,* No. 04-144, at 15 (ARB June 2, 2006) (noting that protected activity does not include reporting that could adversely affect the corporation's financial condition, when no fraudulent or deceptive activity is suspected). Here, however, Lawson allegedly reported specific problems in corporate conduct which – because they involved the delicate and regulated relationship between mutual fund and investment adviser – she may have had reason to believe constituted fraudulent activity.

Fidelity Investments next argues that any communications that did take place were merely part of her job, rather than a reporting of fraud for whistleblower purposes. The legal principle cited to support this charge comes not from SOX, but rather from the federal Whistleblower Protection Act, 5 U.S.C. § 1211 *et seq. See Huffman v. Office of Personnel Mgmt.,* 263 F.3d 1341, 1352 (Fed. Cir. 2001) (finding that protected activity did not include "reporting in connection with assigned normal duties"). Even if SOX incorporates such a rule, however, it would be a matter of fact, not law, whether or not Lawson's activities were performed as part of her regular duties.

3. <u>Zang's Allegations</u>

In the case of Zang, the alleged protected activity was the distribution of the March 2005 memorandum that conveyed his concerns about the SAI's disclosures regarding portfolio manager compensation. Fidelity Management argues that the March memorandum never expressed concern about a violation of federal law relating to shareholder fraud. According to the Defendants, Zang's missive was merely an expression of his own personal views about the conduct of Fidelity's business, not about potential securities violations.

As with Lawson's claims, I cannot dispose of Zang's complaint before the factfinding stage of litigation. Zang has alleged facts supporting his belief that Fidelity's compensation scheme was not transparent. As I have discussed, compensation of investment advisers generally is a matter that has received considerable attention from both Congress and the federal courts. Whether or not the SAI disclosures were in fact fraudulent statements that violated federal law is not at issue. Rather, the issue is one of belief, and I find that Zang has alleged facts relating to improper communications to the SEC regarding manager compensation. These allegations are sufficient to support a claim of objectively and subjectively reasonable belief that Fidelity was failing to meet its obligations under the ICA or SEC rules and regulations.

The Defendants maintain that Zang's comments amounted to a "quibbling" over the technically correct description of the analyst compensation formula. How to characterize Zang's comments is a matter for factual development, not legal resolution on a motion to dismiss. It is adequate at this stage to conclude that Zang's characterizations of his communication could be supported by the allegations in his Complaint.

D. Plaintiffs' State Wrongful Discharge Claims

Both Plaintiffs allege wrongful discharge in violation of public policy, but they identify different public policies in play. Zang points to the protection of investors in mutual funds from fraud, and protecting the reporting of such fraud by employees, while Lawson points more broadly to the protection of whistleblowing concerning potential violations of federal laws concerning fraud against shareholders.

Massachusetts recognizes the "at-will termination" doctrine, which permits either party, the employer or employee, to terminate employment at any time "without notice, for almost any reason or for no reason at all." *Wright v. Shriners Hosp. for Crippled Children,* 589 N.E.2d 1241, 1244 (Mass. 1992). Massachusetts courts have permitted, however, an exception to this rule when based on public policy. *Smith-Pfeffer v. Superintendent of the Walter E. Fernald State School,* 533 N.E.2d 1368, 1371 (Mass. 1989). But the public policy exception to the at-will termination rule is "quite narrow." *Mitchell v. TAC Technical Servs., Inc.,* 734 N.E.2d 1198, 1201 (Mass. 2000). For a claimant to proceed, he or she must identify "a statute or regulation which clearly expresses a legislative policy" of Massachusetts. *Tighe v. Career Sys. Dev. Corp.,* 915 F. Supp. 476, 484 (D. Mass. 1996); *see also Wright,* 589 N.E.2d at 1244-46 (finding no claim for wrongful discharge when the court could not find a statute that "clearly expresse[d] a legislative policy" that protected or encouraged the plaintiff's activity). To identify a termination that is unlawful on public policy grounds, one must find that "the Massachusetts] Legislature has expressed a policy position concerning the rights of employees." *Mello v. Stop & Shop Cos., Inc.,* 524 N.E.2d 105, 106 (Mass. 1988).

Neither Plaintiff identifies a public policy expressed by Commonwealth lawmakers that is at risk in this situation. The only statute to which Zang refers is "federal whistle-blower provisions," presumably Section 806 of SOX. Lawson likewise does not provide sources supporting her claim that Massachusetts has a public policy protecting whistleblowing that involves federal SEC violations and shareholder fraud.

There is case law, however, acknowledging a Massachusetts public policy to protect whistleblowers more generally. *See Smith v. Mitre Corp.,* 949 F. Supp. 943, 950 (D. Mass. 1997) (concluding that the Supreme Judicial Court would apply the public policy exception to include protection for whistleblowers); *Tighe,* 915 F. Supp. at 484 (acknowledging "a legislative policy encouraging persons such as [the plaintiff] to inform the DOL of possible contractual or statutory violations by their employers"); *Shea v. Emmanuel College,* 682 N.E.2d 1348, 1350 (Mass. 1997) (holding that an employer can be liable for discharges based on an employee's internal complaints of alleged criminal violations); *Mello,* 524 N.E.2d at 108 n.6 ("We assume . . . that an at-will employee who 'blew the whistle' within his company on wrongdoing is entitled to protection. . . .").

It is therefore conceivable that a plaintiff may plead wrongful discharge based on retaliation for whistleblowing activity generally. Such pleading is not sufficient in these cases, however, to give the Plaintiffs a cause of action. A plaintiff cannot seek common law remedies for wrongful discharge when a statutory scheme already provides remedies for the same conduct. In *Melley v. Gillette Corp.,* 475 N.E.2d 1227 (Mass. App. 1985) ("*Melley I*"), whose reasoning was adopted by the Supreme Judicial Court, 491

N.E.2d 252, 253 (Mass. 1986), the Appeals Court held that for a common law remedy of wrongful discharge to apply, there must be no other way to vindicate the public policy at stake. *Melley I,* 475 N.E.2d at 1228. If the public policy "is already protected by a comprehensive legislative scheme," there is no warrant for the creation of a new common law remedy. *Id.* The *Melley* court expressed concerns that the common law action would permit claimants to circumvent the preferred legislative remedy, and would create "duplicative remedies" disfavored by the Supreme Judicial Court. *Id.* at 1229. SOX, which expresses a public policy of protecting shareholders from fraud and the whistleblowers who report this fraud, has an explicit remedy for dealing with terminations that run contrary to this public policy.

Zang responds to this legal analysis by crying foul: The Defendants cannot simultaneously argue that SOX does not cover investment adviser employees such as the Plaintiffs, while also arguing that investment adviser employees are barred from common law relief by nature of the SOX statutory scheme. Zang's position misconstrues the application of a statutory scheme to the common law of wrongful discharge. SOX does not preclude relief at common law because employees are entitled to relief through SOX; rather, the SOX statutory scheme precludes relief at common law because Congress has already spoken on how (and to whom) remedies should be made available.

Lawson argues that even if a federal statute does address a public policy, a claimant can still seek common law relief for wrongful discharge if the policy precedes the statute. *See Norris v. Lumbermen's Mut. Cas. Co.,* 881 F.2d 1144, 1153 (1st Cir. 1989) (permitting a plaintiff to pursue wrongful discharge when it involved a strong public policy favoring the reporting of safety hazards, "independent of" and "regardless of" the statute that addressed the same policy). I am not persuaded that the protection of employees who report violations of federal shareholder rules is a "strong public policy" of the same magnitude as maintaining safety at nuclear energy plants, such that it warrants independent enforcement through the common law. *See id.* Nor am I persuaded that this public policy existed in any articulable form before the Enron scandal and subsequent congressional response through SOX.

Having found no public policy articulated by the Massachusetts legislature that is violated by the Plaintiffs' discharge (or alleged "constructive discharge," in Lawson's case), and having concluded that the public policy articulated at the federal level is already protected through an adequate remedial scheme, I dismiss Count II of the Complaint.

IV. CONCLUSION

For the reasons stated more fully above, I DENY Fidelity Investments' Motion to Dismiss Lawson's Amended Complaint (Doc. No. 24 in Civil Action No.

08-10466-DPW), and I DENY Fidelity Management's Motion to Dismiss Zang's Complaint (Doc. No. 25 in Civil Action No. 08-10758-DPW) as to the SOX claims (Count I). I GRANT the Defendants' motions as to the state wrongful discharge claims (Count II).

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals
For the First Circuit

No. 10-2240

JACKIE HOSANG LAWSON; JONATHAN M. ZANG,

Plaintiffs, Appellees/Cross-Appellants,

v.

FMR LLC, f/k/a FMR Corp.; FMR CO., INC.; FMR CORP., d/b/a Fidelity Investments; FMR LLC, d/b/a Fidelity Investments; FIDELITY BROKERAGE SERVICES, LLC, d/b/a Fidelity Investments; FIDELITY MANAGEMENT & RESEARCH COMPANY,

Defendants, Appellants/Cross-Appellees.

Before

Lynch, *Chief Judge,*
Torruella, Boudin, Howard and Thompson,
Circuit Judges.

ORDER OF COURT

Entered: April 6, 2012

The petitions for rehearing filed by Jackie Hosang Lawson and Jonathan M. Zang having been denied by the panel of judges who decided the case, and the petitions for rehearing en banc filed by Jackie Hosang Lawson and Jonathan M. Zang having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petitions for rehearing and the petitions for rehearing en banc be *denied*.

TORRUELLA, *Circuit Judge,* dissenting without comment.

THOMPSON, *Circuit Judge,* dissenting. For the reasons expressed in my dissent from the panel opinion, I dissent from the denial of rehearing. *See Lawson et al. v. FMR LLC et al.,* 670 F.3d 61, 83 (1st Cir. 2012) (Thompson, J., dissenting).

By the Court:

/s/ Margaret Carter, Clerk

cc: Hon. Douglas P. Woodlock, Ms. Sarah Thornton, Clerk, United States District Court for the District of Massachusetts, Mr. Scalia, Ms. Talwani, Mr. Rees, Mr. Zang, Ms. Smith, Ms. Rieser, Mr. Rosenberg, Mr. Nemser, Mr. Humes, Ms. Conrad, Ms. Kawka, Mr. Karr, Ms. Butler, Mr. Benoit, Mr. Lesser, Mr. Goldsmith.

U.S. Department of Labor [SEAL]
Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

THOMAS SPINNER,	**ARB CASE NOS. 10-111**
COMPLAINANT,	**10-115**
v.	**ALJ CASE NO. 2010-SOX-029**
DAVID LANDAU and ASSOCIATES, LLC,	**DATE: May 31, 2012**
RESPONDENT.	

BEFORE:
THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Daniel A. Corey, Esq., *Sensible Law Institute*, Drexel Hill, Pennsylvania

***For the Respondent*:**
Keith J. Rosenblatt, Esq., Jacqueline K. Hall, Esq., *Littler Mendelson, P.C.*, Newark, New Jersey

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*; Judge E. Cooper Brown concurring.

FINAL DECISION AND ORDER OF REMAND

This case arises under Section 806 of the Sarbanes-Oxley Act of 2002 (Section 806), 18 U.S.C.A. § 1514A (West Supp. 2010).[1] The issue on appeal is whether Section 806 applies only to publicly traded companies and their employees.[2] Thomas Spinner was an employee of Respondent David Landau & Associates (DLA). DLA was a contractor of a publicly traded corporation but was not itself publicly traded. After DLA terminated Spinner's employment, he filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his termination violated Section 806 and its implementing regulations at 29 C.F.R. Part 1980 (2011). The Administrative Law Judge (ALJ) granted summary decision in favor of DLA, concluding that DLA was not publicly traded and therefore neither DLA nor its employees were covered under Section 806. We reverse and remand.

---

[1] The Act and its implementing regulations (29 C.F.R. Part 1980) have been amended since Spinner filed his complaint. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010); 76 Fed. Reg. 68,084-97 (Nov. 3, 2011). Neither the amendments to SOX nor the regulations' amendments would affect the outcome of this case.

[2] For convenience, we refer to companies registered under Section 12 or required to file under Section 15(d) of the Exchange Act as "publicly traded."

Background

Spinner is a Certified Public Accountant, Certified Internal Auditor, and Certified Fraud Examiner. DLA hired Spinner in March 2008 as an internal auditor. DLA provides internal audit, forensics, and advisory and management consulting services, including SOX audit and compliance services,[3] under contract to S.L. Green Realty Corp. (S.L. Green), a publicly traded company.[4] On or about September 2, 2008, DLA assigned Spinner to perform full-time auditing services for S.L. Green. DLA subsequently removed Spinner from this assignment, and on or about October 1, 2008, terminated Spinner's employment. Spinner filed an administrative complaint with OSHA on December 29, 2008, claiming DLA violated Section 806 when it terminated him because he reported internal control and reconciliation problems at S.L. Green. OSHA issued its finding on February 5, 2010, concluding in part that DLA, as a contractor of S.L. Green, was itself a covered entity and that Spinner, having alleged misconduct by S.L. Green, was a covered employee. OSHA concluded, however, that clear and convincing evidence demonstrated that DLA would have taken the adverse action even if Spinner had not engaged in protected activity.

---

[3] ALJ Recommended Summary Decision Dismissing Complaint (D. & O.), at n.1.

[4] The Respondent refers to S.L. Green as "a client for whom DLA had conducted audits in years past." DLA Br. at 9. The parties do not dispute that DLA is a contractor of S.L. Green.

Spinner objected to OSHA's findings, and the case was assigned to an ALJ. DLA filed a motion for summary decision on two grounds: DLA is not a covered entity and DLA would have terminated Spinner even if he had not engaged in protected activity. The ALJ granted summary decision, as matter of law, on the grounds that DLA was not a covered entity and that Spinner, as an employee of DLA, was not a covered employee. On appeal to the Administrative Review Board (ARB or Board), Spinner argues that the ALJ erred and that he was covered as an employee of DLA because DLA was a contractor, subcontractor, or agent of S.L. Green. DLA cross-petitioned requesting the ARB to issue a $1,000 penalty against Spinner for filing a fraudulent administrative claim. DLA also asked the Board to hold that the ALJ erred in failing to find that clear and convincing evidence demonstrated that it would have terminated Spinner absent protected activity.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under the SOX. *See* Secretary's Order 1-2010 (Delegation of Authority and Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). We review a recommended decision granting summary decision de novo. That is, the standard that the ALJ applies also governs our review. 29 C.F.R. § 18.40 (2011). Accordingly, summary decision is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The determination of whether facts are material is based on the substantive law upon which each claim is based. A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the action.

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law. *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002). "To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'" *Bobreski v. U.S. Envtl. Prot. Agency*, 284 F. Supp. 2d 67, 73 (D.D.C. 2003) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party." *Bobreski*, 284 F. Supp. 2d at 73.

Furthermore, a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R.

§ 18.40(c); *Webb v. Carolina Power & Light Co.*, No. 1993-ERA-042, slip op. at 4-6 (Sec'y July 14, 1995).

DISCUSSION

This case presents the issue of whether Section 806(a) of the Sarbanes-Oxley Act, 18 U.S.C.A. § 1514A(a), affords whistleblower protection to an employee of a contractor of a publicly traded company when the employee reports activity that he reasonably believes constitutes a violation of the laws or SEC regulations identified under Section 806. The ALJ cited the language of SOX, its legislative history, and decisions from a variety of forums to support his conclusion that Section 806's coverage is limited to publicly traded companies and their employees.[5]

[5] Although the decision is imprecise on this point, the ALJ appeared to also rule that only publicly traded employers are covered by the proscriptions contained in Section 806. We disagree and reverse. Given our precedent, the implementing regulations, and the fact that the plain language of Section 806 explicitly identifies several categories of potentially covered employers which are not registered or required to file under the Exchange Act (i.e., "any officer, employee, contractor, subcontractor, or agent of such company"), it is unnecessary to elaborate on our conclusion that Section 806 covers certain non-publicly traded entities including contractors. On this issue, we concur with the First Circuit, which recently concluded that "the clause 'officer, employee, contractor, subcontractor, or agent of such Company' goes to who is prohibited from retaliating or discriminating." *Lawson v. FMR, LLC*, 670 F.3d 61, 68 (1st Cir. 2012); *see also Kalkunte v. DVI Financial Servs. & AP Servs.*, ARB Nos. 05-139, -140; ALJ No. 2004-SOX-056 (ARB Feb. 27, 2009) (holding a contractor jointly liable, together with a

(Continued on following page)

D. & O. at 2-3. Department of Labor regulations and Board precedent, however, state that whistleblower protection is not limited solely to employees of publicly traded companies. As explained below, we reverse the ALJ's decision and find that Spinner is a covered employee under Section 806.

The Department of Labor regulations implementing Section 806, which we are obliged to follow,[6] define employee as "an individual presently or formerly working for a company or company representative . . . or an individual whose employment could be affected by a company or company representative." 29 C.F.R. § 1980.101. A "company representative" is defined as "any officer, employee, contractor, subcontractor, or agent of a company." *Id.* These regulations explicitly identify two distinct bases for coverage as an "employee" under the statute: (1) coverage based simply upon being an employee (or former employee) of a named publicly traded company, or a "contractor, subcontractor or agent" of such company and (2) coverage based upon the more conventional master-servant relationship expressed as "an individual whose employment could be affected by" a named

---

publicly traded company, for retaliatory discharge of an employee of the public company where the contractor, through its own employees, made decisions affecting the employee's employment).

[6] *See* 75 Fed. Reg. 3925 (Jan. 15, 2010) ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations . . . and shall observe the provisions thereof, where pertinent, in its decisions.").

employer. As explained in the preamble accompanying the regulations' promulgation, the Department views Section 806 as "protect[ing] the employees of publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies."[7]

Consistent with the Department's understanding, the ARB has repeatedly interpreted Section 806 as affording whistleblower protection to employees of contractors, subcontractors, or agents of publicly traded companies, regardless of the fact that the contractor, subcontractor, or agent was not itself a publicly traded company. *See Charles v. Profit Inv. Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-040 (ARB Dec. 16, 2011); *Funke v. Federal Express Corp.*, ARB No. 09-004, ALJ No. 2007-SOX-043 (ARB July 8, 2011); *Johnson v. Siemens Building Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011)[8] As the ARB explained in *Funke*:

---

[7] 59 Fed. Reg. 52,104, 52,105-52,106 (Aug. 24, 2004). This expansive definition of "employee" under Section 806 reflects decades of Department of Labor precedent extending coverage under analogous whistleblower statutes to employees of contractors. *See* discussion, *infra* pp. 13-16.

[8] In *Kukucka v. Belfort Instrument Co.*, ARB Nos. 06-104, -120; ALJ Nos. 2006-SOX-057, -081 (ARB Apr. 30, 2008), the ARB recognized in dicta that an employee of a contractor, subcontractor, or agent of a publicly traded company could be protected by Section 806. In *Gale v. World Fin. Group*, ARB No. 06-083, ALJ No. 2006-SOX-043 (ARB May 29, 2008), the ARB cited evidence showing that complainant's employer served as

(Continued on following page)

> In drafting § 1514A, Congress pointedly expanded traditional employer-employee definitions by subjecting additional entities to liability for retaliation, not only publicly traded companies, but "any officer, employee, contractor, subcontractor, or agent of such company." Congress understood that to effectively address corporate fraud, the law needed to extend to entities *related* to public companies – accounting firms, law firms, and the like – which may themselves be involved in performing or disguising fraudulent activity. Employees of these non-public entities are also covered under § 1514A, and by extension, their reports of misconduct by the related public company (not their employer) would be protected under the statute.[9]

Notwithstanding this body of ARB case authority, the majority in *Lawson v. FMR, LLC*, 670 F.3d 61 (1st Cir. 2012), recently held that Section 806 provides whistleblower protection only to employees of publicly traded companies. The *Lawson* plaintiffs were employees of investment advisors servicing publicly traded mutual funds. After rejecting respondents'

---

an agent of a public company in promoting sale of securities products as sufficient to establish a genuine issue of fact concerning coverage under Section 806). In *Klopfenstein v. PCC Flow Techs.*, ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006) (*Klopfenstein I*), the ARB held that a non-publicly traded subsidiary acting as an agent of its publicly traded parent company was itself liable under Section 806 for its retaliatory termination of one of its employees.

[9] *Funke*, ARB No. 09-004, slip op at 9-10.

motion for summary judgment for lack of coverage, the District Court certified to the First Circuit the question of coverage of employees of investment advisors servicing publicly traded mutual funds. The First Circuit, like the ALJ in this case, ruled that employees of those non-publicly traded entities are not covered under Section 806.

The First Circuit's *Lawson* holding is not controlling in this case, and we decline to adopt it.[10] As stated in *Charles*, ARB No. 10-071, and *Johnson*, ARB No. 08-032 – both issued prior to the First Circuit's *Lawson* decision – we cannot conclude that Section 806 coverage is limited to employees of public companies. The legislative history of the SOX "demonstrates that Congress intended to enact robust whistleblower protections for more than employees of publicly traded companies." *Johnson*, ARB No. 08-032, slip op. at 17. Nevertheless, in light of the First Circuit's decision in *Lawson*, it is imperative to fully explain the basis for our holding that accountants employed by private accounting firms, who in turn

[10] The case before us did not arise in the First Circuit, so we are not bound by *Lawson*. Because there is no rule of intercircuit stare decisis, federal agencies are not bound by the decision of a circuit court in litigation arising in other circuits. *See Brizendine v. Cotter & Co.*, 4 F.3d 457, 462 n.4 (7th Cir. 1993) (vacated on other grounds); *see generally* Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 735-41 (1989). *See also Nichols v. Bechtel Constr. Inc.*, 1987-ERA-044, slip op. at 6 (Sec'y Oct. 26, 1992), *aff'd sub nom. Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995).

provide SOX compliance services to publicly traded corporations, are covered as employees of contractors under Section 806.

1. Section 806 Textual Analysis

Congress enacted Section 806 on July 30, 2002, as part of the comprehensive effort contained in the Sarbanes-Oxley Act (SOX) to address corporate fraud. Title VIII is designated the Corporate and Criminal Fraud Accountability Act of 2002 (the Accountability Act). Section 806, the employee-protection provision, prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to certain enumerated infractions. The provision, as amended, reads, 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. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), 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 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], 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

(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.A. § 1514A.

To determine whether an employee of a "contractor, subcontractor or agent" is afforded protection under Section 806, the starting point "is the language of the statute itself"[11] and the implementing regulations construing the relevant statutory text.[12] The plain language of the statute does not restrict its application to employees of publicly held companies. Congress could easily have limited coverage simply by statutorily defining the term "employee" or by adding the words "of such company" after the term "employee" – exactly as Section 806 limits those liable under the statute to "any officer, employee, contractor, subcontractor, or agent of *such company*." Had Congress chosen to so limit the text, Section 806 would extend coverage solely to "employees *of such company* [with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d))]."[13] The statute contains no such limitation, and we decline to impose one.

Nevertheless, the statute's lack of definition of "employee" leaves the text open to competing

---

[11] *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); SINGER & SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 46.1 (7th Ed.).

[12] *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009).

[13] *See Pac. Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680, 687 (2012).

problematic interpretations. The *Lawson* majority argues that Congress could not have intended to protect employees of contractors, subcontractors, or agents because that would also mean that Congress intended to protect employees of an "employee" or employees of an "officer," which leads to an absurd result. *United States v. Wilson*, 503 U.S. 329, 334 (1992) (statutes should be construed to avoid absurd results); *Lawson*, 670 F.3d at 68-69. We reject this forced distribution of "employee of" to the list of actors prohibited from retaliating against employees in violation of Section 806. The commentary accompanying the DOL's regulations implementing Section 806 explains Congress's reasoning for adding additional parties to the list of actors prohibited from retaliation.

> In addition to the general definitions, the regulations define "company" and "company representative" to together include all entities and individuals covered by Sarbanes-Oxley. The definition of "named person" includes the employer as well as the company and company representative who the complainant alleges in the complaint to have violated the Act. Thus, the definition of "named person" will implement Sarbanes-Oxley's unique statutory provisions that identify individuals as well as the employer as potentially liable for discriminatory action. We anticipate, however, that in most cases the named person likely will be the employer.

69 Fed. Reg. 52,105.

Section 806's use of "employee" is logically separate from the clause prohibiting actors from retaliation. After proscribing retaliation by several entities, Congress listed protections for employees without using words to limit which kind of employee was protected. As noted above, Congress easily could have limited "employee" to "employee of a company registered under Section 12 or required to file under Section 15(d) of the Exchange Act" in the text of the provision itself but chose not to.

In any case, the restrictive construction of the statute that DLA and the ALJ adopted results in an entirely implausible reading of the statute's language. Under such a reading, coverage of contractors, subcontractors, or agents would be limited to those contractors, subcontractors, and agents who have the ability to affect the terms, conditions, and privileges of employees of publicly traded companies – not their own employees. A successful Section 806 complainant may be entitled to reinstatement to his or her former employment and the award of back pay. But rarely would a contractor or especially a subcontractor be able to adversely affect the terms and conditions of an individual's employment with a publicly traded company – let alone be able to reinstate that individual to his or her former employment following successful suit against the contractor or subcontractor by the aggrieved employee. And if they did, the contractor or subcontractor would likely be an agent of the public company, thus rendering "contractor" and "subcontractor" superfluous. *Lawson*, 670 F.3d at 84-85 (Thompson dissenting).

That said, the statute's lack of definition of employee results in some ambiguity. Thus, we necessarily turn to other rules of statutory interpretation in defining the scope of employee coverage under Section 806.

2. Use of "Employees of Publicly Traded Companies" in Section 806's Title

The ALJ's conclusions and the Respondent's arguments urge the ARB to construe Section 806 to apply only to employees of publicly traded companies because of Section 806's caption, "employees of publicly traded companies," and similar statements found in its legislative history. We do not find the caption, "employees of publicly traded companies," to be controlling. As the Supreme Court said in *Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co.*:

> Th[e] heading is but a short-hand reference to the general subject matter involved. . . . [H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most [general] manner; to attempt to refer to each specific provision would often be ungainly as well as useless. . . . For interpretative purposes, they are of use only when

> they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

331 U.S. 519, 528-29 (1947)

In this case, the oft-cited rule against treating statutory titles as controlling rings true. Neither the title nor the caption describes the full scope or complexity of Section 806's provisions. Several indicia and the text itself indicate that Congress held no such intention for Section 806 coverage. The phrase "employees of public companies" serves as shorthand for the typical complainant but not a concrete rule describing every complainant. Congress also used similar shorthand in the caption of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (Thomson/West 2007), "Discrimination against airline employees." But as we discuss below, the AIR 21 text includes coverage of employees of contractors and subcontractors. Moreover, the Dodd-Frank amendment added express coverage for employees of subsidiaries, affiliates, and statistical rating organizations to Section 806. Dodd-Frank, P.L. No. 111-203 § 929A, 124 Stat. 1848, 1852. While clarifying or adding coverage for employees of these private entities, Congress did not change Section 806's caption "employees of public companies." It did not feel the need to because it never intended for this shorthand to be a limitation on its intended coverage of employees of contractors, subcontractors, or agents.

As noted above, the ARB is bound by the DOL regulations.[14] During the notice-and-comment phase, one commentator argued that the proposed DOL regulations implementing Section 806 improperly extended coverage beyond the statutory language found in the caption. The DOL responded that regulations accurately reflect the text of Section 806.

> Plains AAP commented that the regulatory definitions of "employee" and "company representative" work together to broaden the statutory definition of protected employees. Specifically, Plains AAP commented that section 806(a) of the Sarbanes-Oxley Act is captioned "Whistleblower protection for employees of publicly traded companies," yet the definitions of "employee" and "company representative" in the regulations provide protection to employees of contractors and subcontractors of publicly traded companies. OSHA believes that the definitions in this section accurately reflect the statutory language. Notwithstanding its caption, section 806(a) expressly provides that no publicly traded company, "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. * * *" The statute thus protects the employees of

[14] *See* 75 Fed. Reg. 3925 (Jan. 15, 2010); *Williams v. Am. Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010).

> publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies. Accordingly, OSHA does not believe that its regulatory definitions broaden the class of employees that are protected under the plain language of Sarbanes-Oxley.

69 Fed. Reg. 52,105-06.

Accordingly, we conclude that Congress did not intend for the content of the caption to limit coverage to only employees of publicly traded companies.

3. Legislative History Confirms Broad Coverage

Nothing in the SOX's legislative history indicates that Congress intended to limit whistleblower protection under Section 806 to only employees of publicly traded companies.[15] Indeed, denying coverage to employees of contractors, subcontractors, or agents runs counter to the goals of Section 806 and SOX generally. The purpose of the statute is to protect the investing market and the employees who blow the whistle on issuer-related activities contained in Section 806. The Senate Report accompanying the amendment adding whistleblower coverage provided:

> The alleged activity Enron used to mislead investors was not the work of novices. It

---

[15] *Lawson*, 670 F.3d at 86-87.

was the work of highly educated professionals, spinning an intricate spider's web of deceit. The partnerships – with names like Jedi, Chewco, Rawhide, Ponderosa and Sundance – were used essentially to cook the books and trick both the public and federal regulators about how well Enron was doing financially. The actions of Enron's executives, accountants, and lawyers exhibit a "Wild West" attitude which valued profit over honesty. . . .

Much of this conduct occurred with "extensive participation and structuring advice from [Arthur] Andersen," ("Andersen") which was simultaneously serving as both consultant and "independent" auditor for Enron.

With the assistance of Andersen and its other auditors, Enron apparently successfully deceived the investing public and reaped millions for some select few insiders. To the outside world, Enron and its auditors were either not reporting their massive debt at all, or were making "disclosures [that] were obtuse, did not communicate the essence of [Enron] transactions completely or clearly, and failed to convey the substance of what was going on between Enron and its partnerships". . . . In short, through the use of sophisticated professional advice and complex financial structures, Enron and Andersen were able to paint for the investing public a very different picture of the company's financial health than the true picture revealed. . . .

S. Rep. 107-146, 2002 WL 863249, at **2-3 (May 6, 2002) (internal footnotes omitted).

The legislative history discusses not only Congress's objective of protecting employees of a publicly traded company, but also protecting employees of private firms that work with, or contract with, publicly traded companies when such employees blow the whistle on fraudulent corporate practices. The Senate Report stated:

> As investors and regulators attempted to ascertain both the extent and cause of their losses, employees from Andersen were allegedly shredding "tons" of documents, according to the Andersen Indictment. . . .
>
> The apparent efforts to cover up any alleged misconduct by Enron or Andersen were not limited to Andersen and the destruction of physical evidence and documents. In a variety of instances when corporate employees at both Enron and Andersen attempted to report or "blow the whistle" on fraud, but [sic] they were discouraged at nearly every turn. For instance, a shocking e-mail from Enron's outside lawyers to an Enron official was uncovered. This e-mail responds to a request for legal advice after a senior Enron employee, Sherron Watkins, tried to report accounting irregularities at the highest levels of the company in late August 2001. The outside lawyer's [sic] counseled Enron, in pertinent part, as follows:

> You asked that I include in this communication a summary of the possible risks associated with discharging (or constructively discharging) employees who report allegations of improper accounting practices: 1. Texas law does not currently protect corporate whistleblowers. The supreme court has twice declined to create a cause of action for whistleblowers who are discharged * * *

In other words, after this high level employee at Enron reported improper accounting practices, Enron did not consider firing Andersen; rather, the company sought advice on the legality of discharging the whistleblower. . . .

According to media accounts, this was not an isolated example of whistleblowing associated with the Enron case. In addition, a financial adviser at UBS Paine Webber's Houston office claims that he was fired for e-mailing his clients to advise them to sell Enron stock. A top Enron risk management official alleges he was cut off from financial information and later resigned from Enron after repeatedly warning both orally and in writing as early as 1999 of improprieties in some of the company's off-balance sheet partnerships. An Andersen partner was apparently removed from the Enron account when he expressed reservations about the firm's financial practices in 2000. These

> examples further expose a culture, supported by law, that discourage employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally. This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.

S. Rep. 107-146 at *4-5 (internal footnotes omitted).

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 most likely to uncover and comprehend evidence of potential wrongdoing. Congress was clearly concerned about the role Arthur Anderson [sic] played in the Enron "debacle" and the retaliation exercised against one of its partners who attempted to blow the whistle.[16]

[16] It is even more difficult to imagine that Congress would have intended to leave unprotected outside counsel who are

(Continued on following page)

The Respondents argue that congressmen repeatedly noted that SOX applies exclusively to public corporations registered with the SEC. 148 Cong. Rec. S. 7350, 7351 (July 25, 2002) ("[L]et me make very clear that it applies exclusively to public companies – that is, to companies registered with the Securities and Exchange Commission. It is not applicable to private companies, who make up the vast majority of companies across the country."); *see also* 148 Cong. Rec. S. 6493-95, S. 6330. The Respondents misconstrue these remarks, however, which address the comprehensive accounting requirements contained in the SOX Act and do not refer specifically to the whistleblower provisions. Read in context, these references to SOX applying only to "public companies" reflect a congressional aim to assuage the concerns of small private companies worried about the burden of SOX's regulatory regime. Congress sought to assure small business that the large publicly owned companies ultimately

required under Section 307 of SOX to report evidence of material securities law violations. 15 U.S.C.A. § 7245, 17 C.F.R. Part 205. *See Jordan v. Sprint-Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 16 (ARB Sept. 30, 2009) ("SOX Section 307 requiring an attorney to report a 'material violation' should impliedly be read consistent with SOX Section 806, which provides whistleblower protection to an 'employee' . . . who reports such violations. Thus, attorneys who undertake actions required by SOX Section 307 are to be protected from employer retaliation under the whistleblower provisions of SOX Section 806.").

responsible to shareholders were the focus of SOX's regulatory requirements.[17]

4. The Statutory Framework

The Sarbanes-Oxley Act's overall statutory scheme further supports our broad interpretation of employee coverage under Section 806 as but another of the myriad means that Congress fashioned to combat fraud. *See Succar v. Ashcroft*, 394 F.3d 8, 26 (1st Cir. 2005) ("[t]he terms and provisions of [the text at issue] must be understood in the larger context of the statutory scheme). As the First Circuit explained, SOX "is a major piece of legislation bundling together a large number of diverse and independent statutes, all designed to improve the quality of and transparency in financial reporting and auditing of public companies." *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 9 (1st Cir. 2006). The Court also noted that "[t]he whistleblower protection provision codified in 18 U.S.C. § 1514A is a relatively small part of the Sarbanes-Oxley Act which is composed of many separate statutes and statutory schemes aimed at achieving the act's investor-protection goals." *Id.* at 5. An interpretation limiting protection of whistleblowers to those only directly employed by a publicly

[17] As Senator Enzi explained: "Our intent with this bill is not to have the same principles that apply to the Fortune 500 companies apply to the mom-and-pop business. . . . We have taken a lot of care to be sure we are not cascading the provisions down to small business." 148 Cong. Rec. S6339 (July 8, 2002).

traded company would sabotage the overriding purpose of protecting investors. The overall statutory framework and purpose demonstrate, indeed require, that Section 806 protects whistleblowing by employees of contractors and subcontractors to the public company.

5. Section 806 Follows the Framework of Analogous Whistleblower Statutes

Finally, it should be recognized that our inclusive definition of "employee" under Section 806 reflects decades of Department of Labor precedent extending coverage under analogous whistleblower statutes to employees of contractors. Congress patterned Section 806 on similar whistleblower protection provisions in the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003 & Supp. 2011); AIR 21, 49 U.S.C.A. § 42121; and the Pipeline Safety Improvement Act of 2002 (PSIA), 49 U.S.C.A. § 60129 (Thomson/West 2007). S*ee* 69 Fed. Reg. 52,105. In particular, SOX's whistleblower-protection provisions very closely parallel the form of the employee-protection provision of Section 519 of AIR 21 codified at 49 U.S.C.A. § 42121. *See* Section 806, 18 U.S.C.A. 1514A(b)(2) (incorporating sections of AIR 21 by reference). AIR 21 provides:

> (a) DISCRIMINATION AGAINST AIRLINE EMPLOYEES. – No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation,

> terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) –

49 U.S.C.A. § 42121. And Section 806 of SOX provides:

> (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. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), 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 –

18 U.S.C.A. § 1514A.

AIR 21's initial operative paragraph (a) is in the form "no air carrier or contractor or subcontractor of an air carrier . . . may . . . discriminate." In Section 806, Congress included the same operative paragraph and form, "no [public company] . . . or any officer, employee, contractor, subcontractor, or agent . . . may . . . discriminate." In Section 806, Congress added "officer," "employee," and "agent" to the list of actors prohibited from retaliating against whistleblowers in violation of Section 806. Both statutes include contractors and subcontractors within their definitions of employers, but neither AIR 21 nor Section 806 explicitly define employees covered under the respective statutes. Nevertheless, AIR 21 has long been interpreted to cover employees of contractors and subcontractors.[18] The same goes for the PSIA – it

---

[18] *See generally Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, -121; ALJ No. 2006-AIR-022 (ARB June 30, 2009). In AIR 21 paragraph (d), Congress expressly excluded employees of air carriers, contractors, and subcontractors who engaged in deliberate violations of the law from coverage under the statute. 49 U.S.C.A. § 42121(d). By inference, Congress must have considered paragraph (a) to include employees of contractors and subcontractors or else it would have no need to exclude certain employees of contractors or subcontractors in paragraph (d) from coverage in paragraph (a).

Congress did not include this interpretive paragraph in Section 806. But the omission of this paragraph does not suggest that Congress intended the two coverage provisions to differ on this point, i.e., to exclude employees of contractors from Section 806 coverage. The legislative history of Section 806 indicated that Congress felt that another phrase, "lawful act," excluded those who were guilty of violations from coverage thus precluding the need to include a paragraph similar to (d) from AIR 21 in Section 806. The Senate Report accompanying the whistleblower amendment stated:

> Section 6 of the bill would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company. . . .
>
> This bill would create a new provision protecting employees when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties

(Continued on following page)

contains a definition of employer that includes a contractor or subcontractor but no definition of employee. Like AIR 21, it has nonetheless been interpreted to cover employees of contractors and subcontractors. *See generally Rocha v. AHR Util. Corp.*, ARB No. 07-112, ALJ Nos. 2006-PSI-001, -002, -003, -004 (ARB June 25, 2009).

For over 20 years, the ERA has been interpreted to include employees of contractors within its coverage, despite the fact that, like Section 806, it contains no statutory definition of "employee." In *Hill v. Tenn. Valley Auth.*, Nos. 1987-ERA-023, -024 (Sec'y May 24, 1989), the Secretary provided a detailed analysis of why employees of one of TVA's contractors had standing to sue TVA under the ERA. The Secretary explained that the ERA's statutory language was not limited in terms to retaliation against any *specific* employer's employees, thereby evincing a congressional intent to extend whistleblower protection beyond the traditional employer-employee relationship. Citing the magnitude of potential danger from the nuclear power industry and the fact that on-site employees of contractors are an important source of information about nuclear safety, the Secretary

---

> in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent. Since the only acts protected are "lawful" ones, the provision would not protect illegal actions, such as the improper public disclosure of trade secret information.

S. Rep. 107-146, 2002 WL 863249 at **18-19 (May 6, 2002).

recognized a compelling need to afford them protection under the statute. Given the ERA's remedial nature and the attendant need to liberally construe it, the Secretary reasoned that excluding employees of contractors from coverage would frustrate the statute's remedial purposes. *See also St. Laurent v. Britz, Inc.*, 1989-ERA-015, slip op. at 2 (Sec'y Oct. 26, 1992) ("Jurisdiction here does not depend upon a direct employer-employee relationship, but derives from the construction and application of the statute."). This reasoning applies with equal force in the context of Section 806.

Because these statutes share similar statutory language, legislative intent, and broad remedial purpose, they should be interpreted consistently. *See Poulos v. Ambassador Fuel Oil Co.*, No. 1986-CAA-001, slip op. at 5-7 (Sec'y Apr. 27, 1987); *Goldstein v. Ebasco Constructors, Inc.*, No. 1986-ERA-036, slip op. at 4 (Sec'y Apr. 7, 1992). The Secretary and courts have routinely looked to precedent interpreting one whistleblower protection statute for guidance in ascertaining congressional intent in another one. *See Bozeman v. Per-Se Tech., Inc.*, 456 F. Supp. 2d 1282 (N.D. Ga. 2006) (citing *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 3d 1365, 1374 (N.D. Ga. 2004)). In enacting Section 806, Congress modeled the legislation on the ERA, AIR 21, and PSIA and used terms that had an accumulated settled meaning under those predecessor statutes. *See* 69 Fed. Reg. 52,105. We find that Congress intended to cover employees of contractors under Section 806.

The Respondent, several ALJs, and the First Circuit in *Lawson* have voiced concerns over the breadth of covering employees of any contractors, subcontractors, or agents without limitation. The ALJ in *Charles* concluded that, "[t]o state that any privately held company under contract with a publicly traded company is a covered employer creates an exceptionally broad interpretation that is outside the scope of the Act." *Charles*, ARB No. 10-071, slip op. at 6. This concern is unfounded for two reasons. First, we are obliged to interpret Section 806 broadly both because it is a remedial statute and the legislative history encourages us to do so. *See Johnson*, ARB No. 08-032, slip op at 16. Second, we note that although the theoretical coverage of employees of any contractors, subcontractors, or agents of public companies might be broad, Section 806 contains built-in limitations including (1) its specific criteria for employees to have a reasonable belief of violations of specific anti-fraud laws or SEC regulations and (2) its requirement that the protected activity was a causal factor in the alleged retaliation.

In sum, we hold 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.

CONCLUSION

Accordingly, we **REVERSE** and **REMAND** this case to the ALJ for further proceedings. Because we remand on the coverage issue and the case did not go to hearing on the merits, DLA's cross-petition claiming that the ALJ failed to find that DLA would have terminated Spinner in the absence of protected activity would be inappropriate for agency review at this time. DLA is free to re-litigate this argument before the ALJ on remand. We **DENY** DLA's cross-petition for $1,000 in penalties against Spinner.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, concurring:

I concur with my colleagues in concluding that the whistleblower protection afforded by Section 806 of SOX, 18 U.S.C.A. § 1514A, applies to employees of contractors, subcontractors, and agents of publicly traded companies. I write separately because I am not convinced, in light of the contrary conclusion reached by the majority in *Lawson v. FMR, LLC*, 670 F.3d 61 (1st Cir. 2012), that my colleagues' analysis adequately addresses the basis for reaching the conclusion that Section 806's protection is not limited to only employees of publicly traded companies.

At the time this case arose, Section 806(a) provided in pertinent part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), 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 . . . which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. . . .[19]

[19] On July 21, 2010, Section 806(a) was amended pursuant to Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1848 (2010), to read as follows (with the additional language provided by the Dodd-Frank amendments highlighted in italics:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934

(Continued on following page)

The Department of Labor regulations implementing Section 806, which the First Circuit concluded in *Day v. Staples*, 555 F.3d 42, 54 n.7 (1st Cir. 2009), are entitled to deference,[20] specifically provide that SOX's

---

(15 U.S.C. 78*l*), or that is 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, 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 *or nationally recognized statistical rating organization*, 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 . . . which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. . . .

In addition to adding nationally recognized statistical rating organizations to the listing of entities prohibited from retaliating against whistleblowers, the amendment clarified that reference in Section 806(a) to a company with 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 includes any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company. *See Johnson v. Siemens Bldg. Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011).

[20] The regulations were adopted pursuant to the Department of Labor's authority to enforce Section 806 by formal

(Continued on following page)

whistleblower protection extends to employees of contractors, subcontractors, and agents of publicly traded companies. The regulations define "employee" to include "an individual presently or formerly working for a company or company representative . . . or an individual whose employment could be affected by a company or company representative," and define "company representative" to mean "any officer, employee, contractor, subcontractor, or agent of a company."[21] As explained in the preamble accompanying the regulations' promulgation, Section 806 is viewed by the Department as "protect[ing] the employees of publicly traded companies as well as the employees of contractors, subcontractors, and agents of those publicly traded companies."[22]

As the majority notes, consistent with the Department's understanding, the ARB has consistently rejected interpreting Section 806 as protecting only employees of publicly traded companies, repeatedly interpreting SOX to afford whistleblower protection to employees of contractors, subcontractors or agents

---

adjudication. *See* 18 U.S.C.A. § 1514A(b)(1). Whether the DOL regulations are or are not entitled to *Chevron* deference, *cf. Lawson v. FMR LLC*, 670 F.3d at 81-82, the ARB is obligated to follow them. *See* 75 Fed. Reg. 3925 (Jan. 15, 2010).

[21] 29 C.F.R. § 1980.101.

[22] 59 Fed. Reg. 52,104; 52,105-52,106 (Aug. 24, 2004). This expansive definition of "employee" under Section 806 reflects decades of Department of Labor precedent extending coverage under analogous whistleblower statutes to employees of contractors. *See* discussion, *infra* pp. 30-31.

of publicly traded companies, regardless of the fact that the contractor, subcontractor or agent was not itself a publicly traded company. *See Charles v. Profit Inv. Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-040 (ARB Dec. 16, 2011); *Funke v. Federal Express Corp.*, ARB No. 09-004, ALJ No. 2007-SOX-043 (ARB July 8, 2011); *Johnson v. Siemens Bldg. Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011); *Klopfenstein v. PCC Flow Techs.*, ARB Nos. 07-021, -022; ALJ No. 2004-SOX-011 (ARB Aug. 31, 2009) (*Klopfenstein II*); *Kalkunte v. DVI Fin. Servs. & AP Servs.*, ARB Nos. 05-139, -140; ALJ No. 2004-SOX-056 (ARB Feb. 27, 2009); *Gale v. World Fin. Grp.*, ARB No. 06-083, ALJ No. 2006-SOX-043 (ARB May 29, 2008); *Kukucka v. Belfort Instruments Co.*, ARB Nos. 06-104, -120; ALJ Nos. 2006-SOX-057, -081 (ARB Apr. 30, 2008); *Klopfenstein v. PCC Flow Techs.*, ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006) (*Klopfenstein I*).

In reaching the contrary conclusion, that only employees of a publicly traded company are covered under Section 806, the ALJ in the instant case cited to and relied upon the ARB's decisions in *Flezar v. American Med. Ass'n*, ARB Nos. 07-091, 08-061; ALJ Nos. 2007-SOX-030, 2008-SOX-016 (ARB Mar. 31, 2009); *Paz v. Mary's Center for Maternal Child Care*, ARB No. 06-031, ALJ No. 2006-SOX-007 (ARB Nov. 30, 2007), and *Flake v. New World Pasta Co.*, ARB No. 03-126, ALJ No. 2003-SOX-018 (ARB Feb. 25, 2004). However, as we pointed out in *Klopfenstein I*, the Board's decision in *Flake* (upon which both *Flezar* and

Pas [sic] rely) did not address the question presented by the instant case:

> The complainant in *Flake* named one respondent: a company that was neither registered under § 12 of the Securities Exchange Act nor, as we determined, required to file reports under § 15(d). That respondent company did not have a public parent. Because we concluded that the company was not required to file under either provision, we held that it was not subject to the Act, noting that "the whistleblower provisions of [the Act] cover only companies with securities registered under § 12 or companies required to file reports under § 15(d) of the Exchange Act." Because there was no public parent involved, we did not have occasion to discuss whether a non-public subsidiary of a public parent could be covered under the Act.[23]

Paz and *Flezar* similarly involved suit against non-publicly traded companies with no contractual or agency relationship to a publicly traded company.

Notwithstanding the ARB's consistent case authority to the contrary, the majority in *Lawson v. FMR, LLC*, 670 F.3d 61 (1st Cir. 2012), construed Section 806 to limit whistleblower protection to employees of publicly traded companies only. As the majority correctly notes, the ARB is not bound to accept the majority's holding in *Lawson* since the

[23] *Klopfenstein I*, ARB No. 04-149, slip op. at 13.

instant case is reviewable in another circuit.[24] Nevertheless, in light of the First Circuit's decision I agree with the majority that it is imperative to fully explain the basis for our interpretation of SOX as affording protection to employees of contractors, subcontractors, and agents of publicly traded companies.

Analysis begins, as it must, with the plain language of Section 806.[25] It is clear from its text that Section 806's prohibition against retaliation extends to publicly traded companies, their subsidiaries,[26] and any officer, employee, contractor, subcontractor, or agent of any such company or its subsidiary.[27] It is far less clear from the plain language of Section 806 who is protected from such retaliation.

---

[24] *See United States v. Mendoza*, 464 U.S. 154, 160 (1984); *Brizendine v. Cotter & Co.*, 4 F.3d 457, 462 n.4 (7th Cir. 1993); *Independent Petroleum Ass'n of America v. Babbitt*, 92 F.3d 1248, 1261-62 (D.C. Cir. 1996) (J. Rogers, dissenting).

[25] As the Supreme Court has observed on numerous occasions, all statutory inquiries must begin with the language of the statute. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 431 (2000); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc*. 447 U.S. 102, 108 (1980). *See also* SINGER AND SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46.1 (7th Ed.).

[26] *See Johnson*, ARB No. 08-032.

[27] *See Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 6 (1st Cir. 2006) (Section 806 "makes clear that the misconduct it protects against is not only that of the publicly traded company itself, but also that of 'any officer, employee, contractor, subcontractor, or agent of such company' who retaliates or otherwise discriminates against the whistleblowing employee.")

The statute affords protection to "an employee" who engages in whistleblower activity without defining what is meant by "employee."[28] This lack of definition leaves the text of Section 806(a) fraught with seemingly irreconcilable complexity in terms of employment relationships. One possible reading of the statute results in extending whistleblower protection to "an employee" of "any officer, employee, contractor, subcontractor, or agent" of a publicly traded company. However, this reading on its face results in the seemingly improbable extension of protection to an *employee of an employee* or *an employee of an officer* of a public company.[29] At the same time, it requires an equally constrained reading of the statute's language to conclude that its protection is

---

[28] The majority in *Lawson* draws a distinction between publicly traded companies and the other identified entities by categorizing the former as "employers" and the latter as "representatives of such employers." *Lawson*, 670 F.3d at 68. This is, however, a distinction without foundation. Section 806(a)'s opening phrase neither begins nor ends with a list of "employers," nor does Section 806(a) otherwise make this distinction.

[29] *See*, however, majority's discussion *infra*, pp. 7-8. The identification in Section 806(a) of "any officer, employee, contractor, subcontractor, or agent" of a publicly traded company is but a listing, consistent with provisions throughout Sarbanes-Oxley, of the non-public entities and individuals, in addition to public companies, whose activities are regulated by federal securities laws (see discussion, *infra*, pp. 28-29) and who are thus potentially liable for discriminatory action. See Department of Labor's commentary accompanying promulgation of Section 806's implementing regulations. 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004).

limited to only employees of publicly traded companies. Section 806 prohibits publicly traded companies and the listed entities from discharging, demoting, suspending, threatening, harassing or in any other way discriminating against an employee with respect to the "terms and conditions of [his or her] employment." As the majority points out, because relief is afforded an aggrieved employee under the statute in the form of reinstatement to one's former employment and the award of back pay, it would be a rare occasion indeed for a contractor or subcontractor to comply with an order awarding such relief where in the equally rare occasion a contractor or subcontractor was found to have adversely affected the terms and conditions of an individual's employment with a publicly traded company. Because such nonpublic entities have no authority over the "terms and conditions" of a public company's employee's employment, an interpretation of Section 806(a) that identifies nonpublic entities such as contractors and subcontractors as entities prohibited from retaliating only against employees of public companies renders their inclusion surplusage. Similarly, if the contractor or subcontractor was merely acting on the publicly traded company's behalf in retaliating against the public company's employee, then the language of the statute prohibiting retaliation by contractors and subcontractors would be rendered superfluous since the acting entity would be barred from retaliation as a statutorily covered "agent" of the public company under Section 806(a). It is a fundamental rule of statutory interpretation that no construction be adopted that would render statutory words or phrases "meaningless, redundant or superfluous."[30]

If any meaning can be derived from Section 806 with clarity, it is that there is nothing within the plain language of the provision that limits protection to only employees of publicly traded companies. As the majority pointes [sic] out, Congress could easily have limited whistleblower protection to employees of publicly traded companies simply by statutorily defining the term "employee" or by adding the words "*of such company*" after the term "employee." Yet Congress chose to do neither.[31] In the absence of plain language of limitation within Section 806(a), the conclusion that the whistleblower protection it affords is limited to employees of publicly traded companies is simply unsupportable. Nevertheless, the statute's extension of whistleblower protection to "an employee" is not without ambiguity, as demonstrated by the conflicting interpretations offered by the majority and dissent in *Lawson*.[32] Consequently, I agree with the

[30] *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985).

[31] "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate treatment." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotations omitted).

[32] "Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." Singer, 2A SINGER AND SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45:2 (7th Ed.).

majority that our analysis does not end here, and that we necessarily must resort to additional cannons of statutory construction to define the scope of employee protection under Section 806.

Consideration is thus given to the title of Section 806 within which Subsection 806(a) is housed[33] and the caption of Subsection 806(a) itself.[34] Neither, however, compels the conclusion that whistleblower protection is limited to only employees of publicly traded companies. Arguably both the title and the caption could be construed as limiting the protection Section 806 affords. However, while the Supreme Court has acknowledged that titles and captions may prove helpful aids in statutory interpretation, "[w]here the text is complicated and prolific," as is the case with SOX and Section 806, "headings and titles can do no more than indicate the provisions in a most general manner."[35]

My colleagues note that in the instant case the rule against treating statutory titles as controlling[36]

---

[33] The title to Section 806 states that the section addresses "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud."

[34] The caption found in the first line of the text of Subsection 806(a) similarly reads: "Whistleblower protection for employees of publicly traded companies."

[35] *Brotherhood of R.R. Trainsmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528 (1947) (citations omitted).

[36] *See, e.g., United States v. Johnson*, 632 F.3d 912, 924 (5th Cir. 2011); *Massachusetts Ass'n of Health Maint. Orgs. v. Ruthhardt*, 194 F.3d 176, 180 (1st Cir. 1999); *United Transp.*

(Continued on following page)

"rings true." It is also true in the case before us that the statutory title and caption shed little light in clarifying the ambiguity found in the term "employee." To begin with, if the title and caption were interpreted as limiting protection to employees of publicly traded companies only, it would be "at the expense of the text itself."[37] If only employees of publicly traded companies are protected then, as previously discussed, it would leave the word "contractor" without any independent meaning. Of greater significance, however, is the fact that neither the title nor the caption describes the full scope of Section 806's provisions. Although Section 806(a) plainly extends coverage to two categories of public companies – those required to register pursuant to section 12 of the Securities Exchange Act of 1934 and those required to file reports under section 15(d) of the 1934 Act – only the first encompasses companies with publicly traded stock. Those required to file reports pursuant to section 15(d) are "public" only "in the sense that they have issued securities that may be sold to the public and are required to make periodic reports to their investors."[38] Although the title and caption make no reference to companies that are required to file reports, coverage under Section 806 is obviously not

---

Union-Illinois Legislative Bd. v. Surface Transp. Bd., 169 F.3d 474, 479 (7th Cir. 1999).

[37] *Massachusetts Ass'n of Health Maint. Orgs.*, 194 F.3d at 180.

[38] *Lawson*, 670 F.3d at 66-67.

limited to "publicly traded companies" as the title and caption suggest. This point is accentuated by the recent Dodd-Frank amendments to Section 806 extending its prohibition against retaliation to any "nationally recognized statistical rating organization."[39] If Congress intended the title and caption to give meaning to the term "an employee," the title and caption would necessarily have been amended as part of the Dodd-Frank textual amendments to Section 806.

Further testament to the fact that the full scope of Section 806 is not described in the title or caption is the title's suggestion that SOX whistleblower protection is limited to "employees . . . who provide evidence of fraud." Yet, as the ARB recognized in *Sylvester v. Parexel Int'l*, the protection that SOX affords does not require in all instances that the employee provide evidence of fraud. Section 806 protects employees who provide information about conduct falling within three broad categories: (1) violations of specific criminal fraud statutes (18 U.S.C. §§ 1341, 1343, 1344, and 1348); (2) violations of any rule or regulation of the SEC; and (3) violations of federal law relating to fraud against shareholders. Only the first and third categories require evidence of fraud. "A violation of 'any rule or regulation of the Securities and Exchange Commission'

---

[39] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, §§ 922(b), (c), 929A, 124 Stat. 1376, 1848, 1852 (2010).

could encompass a situation in which the violation, if committed, is completely devoid of any type of fraud."[40]

If Section 806 was intended to not only protect employees of publicly traded companies, but also employees of their related entities, it would still be reasonable to use the wording found in the title and caption given that all protected employees would have some connection to publicly traded companies, even if indirectly. The broader coverage of Section 806 is obviously too complex for its title. Consequently, I am in full agreement with Judge Thompson's conclusion in *Lawson* that the title "merely describes a specific and common application of a more generally applicable statute."[41] I view the phrase "employees of publicly traded companies" as nothing more than a shorthand designation for ascertaining the typical employee protected under Section 806 rather than the identification of every covered employee.[42]

---

[40] *Sylvester v. Parexel Int'l.*, ARB No. 07-123, ALJ No. 2007-SOX-039, slip op. at 20 (ARB May 25, 2011). *Accord Day*, 555 F.3d at 54-55.

[41] *Lawson*, 670 F.3d at 86 (J. Thompson, dissenting).

[42] Congress used similar shorthand in the caption to the whistleblower protection provision of AIR 21, 49 U.S.C.A. § 42121, after which Section 806 of SOX was modeled in large part. *See* 18 U.S.C.A. § 1514A(b)(2)(A), (C). *See also* S. Rep. No. 107-146, at 30 (2002). Section 42121(a) is entitled, "Discrimination Against Airline Employees." Yet, the ARB has interpreted the text of the section as affording whistleblower protection to employees of contractors and subcontractors as well as air

(Continued on following page)

Turning to the legislative history of SOX, I am in agreement with the majority in sharing Judge Thompson's view that nothing in that history indicates that Congress intended to limit whistleblower protection under Section 806 to only employees of publicly traded companies.[43] The Senate conference report accompanying passage of SOX indicates that a key purpose of Section 806 is "to protect whistleblowers who report fraud against retaliation *by their employers*,"[44] but there is no mention of any imposed limitation on which, in any, employers are covered. There are statements by key members of Congress evidencing an intent to protect employees of publicly traded companies.[45] However, the protection of

---

carriers. 29 C.F.R. § 1979.101. *See Wallum v. Bell Helicopters Textron*, ARB No. 09-081, ALJ No. 2009-AIR-006 (ARB Sept. 2, 2011); *Nagle v. Unified Turbines*, ARB No. 11-004, ALJ No. 2009-AIR-024 (Mar. 30, 2012).

[43] *Lawson*, 670 F.3d at 86-87.

[44] S. Rep. No. 107-146, at *1 (2002) (emphasis added).

[45] *See, e.g.*, statements of Senator Leahy, Chairman of the Senate Judiciary Committee and a key sponsor of Section 806, that the provision "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud," 148 Cong. Rec. S1787 (daily ed. Mar. 12, 2002), that "[a]lthough current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors," *id.* at S1788, and that Section 806 "was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market." 149 Cong. Rec. S1725 (daily ed. Jan. 29, 2003). *See also* post-enactment statement of Sen. Cardin, 156 Cong. Rec.

(Continued on following page)

whistleblowers employed by public companies is not in dispute. The question is whether that protection is limited to only employees of public companies. Nothing in the congressional record expresses any intent to restrict Section 806 in this manner.[46]

S3349 (daily ed. May 6, 2010) ("[t]he whistleblower provisions of the Sarbanes-Oxley Act protect employees of the publicly traded companies").

[46] The Senate Judiciary Committee Report accompanying the Corporate and Criminal Fraud Accountability Act of 2002, the bill that became Title VIII of SOX of which Section 806 is a part, states that the provision "would provide whistleblower protection to employees of publicly traded companies." S. Rep. 107-146, at 13 (2002). However, it is not clear that this constitutes a statement that employees of non-public companies are specifically excluded from protection, or whether this is but a limited shorthand generalization. Similarly, in his introduction to the Senate Conference Report Senator Sarbanes stated that Sarbanes-Oxley "applies exclusively to public companies," *see* 148 Cong. Rec. S7350, 7351 (July 25, 2002), which on its face appears to suggest that only employees of public companies are protected, but just as easily could be interpreted to mean that Section 806 applies to public companies and those parties that act on their behalf (e.g., contractors, subcontractors, and agents) as opposed to private companies that provide no services to publicly traded companies. Moreover, Senator Sarbanes' introductory comment cannot in any way be construed as suggesting that SOX is limited to public companies, and thus that Section 806 does not extend to private companies. For example, SOX Section 307 applies to private attorneys who act as contractors or agents "in the representation of" a publicly traded company, and the creation of Public Company Accounting Oversight Board pursuant to Title I of SOX (Section 101 et seq.) necessarily applies to privately-held accounting and auditing firms doing work for publicly traded companies.

Revealing Congress's intent that whistleblower protection is *not* limited to only employees of public companies is the Senate Judiciary Committee Report accompanying adoption of Section 806, S. Rep. 107-146 (2002). As explained therein, the notorious "Enron debacle," which served as a major impetus in the enactment of SOX's whistleblower protection provision,[47] involved misconduct by not only the publicly-traded Enron Corporation but the "accounting firms, law firms and business consulting firms" (*i.e.*, privately-held contractors, subcontractors, and agents) who performed work for Enron.[48] Complicit in the shareholder fraud and subsequent cover-up in the face of investigation were not only Enron's corporate officers and directors but outside professionals "who helped create, carry out, and cover up the complicated corporate ruse when they should have been raising concerns."[49] Cited in particular was Arthur Anderson [sic], a private accounting and auditing firm retained by Enron. Arthur Anderson [sic] not only facilitated Enron in the fraud and cover-up, but stifled its own employees' attempts at "blowing the whistle" on Enron's violations. "[W]hen corporate employees at both Enron and Anderson [sic] attempted to report or 'blow the whistle' on fraud, [ ] they were discouraged

---

[47] The Senate report labeled the "Enron debacle" a "case study exposing the shortcomings in our current laws." S. Rep. 107-146, at 11.

[48] S. Rep. 107-146, at 4.

[49] *Id.* at 11.

at nearly every turn." It was not only Sherron Watkins, a senior employee at Enron, whose retaliation for whistle blowing was highlighted. Also noted was the removal by Arthur Anderson of one of its partners from the Enron account who expressed reservations about the firm's financial practices and retaliation against a financial advisor at UBS Pain Webber who claimed that he was fired for e-mailing his clients advising that they sell their Enron stock.[50] These examples, the Senate report stated, "expose a culture, supported by law, that discourages employees from reporting fraudulent behavior," resulting in a "corporate code of silence [that] not only hampers investigations, but also creates a climate where wrongdoing can occur with virtual impunity."[51] Viewing the consequences of this "corporate code of silence" as "serious and adverse" for investors in publicly traded companies and the stock market generally, Congress enacted Section 806 in order to "encourage and protect [employees] who report fraudulent activity that can damage innocent investors in publicly traded companies" by providing federal protection to private corporate whistleblowers.[52]

From the foregoing it is clear that Congress was concerned about the involvement of contractors, subcontractors, and agents of public companies, as

---

[50] *Id.* at 5.

[51] *Id.*

[52] *Id.* at 5, 19.

well as the public companies themselves, in performing and disguising fraudulent activities. Congress was no less concerned about protecting employees of such entities who attempt to report such activities. In the wake of the Enron scandal, Congress sought to protect investors in publicly traded companies and restore trust in the financial markets "by ensuring that the corporate fraud and greed may be better detected, prevented and prosecuted."[53] Thus, while Section 806's immediate purpose is "to protect whistleblowers who report fraud against retaliation by their employers,"[54] this was not intended as an end in and of itself. Congress recognized the important role whistleblowers play in deterring corporate fraud and SEC violations, noting that "often, in complex fraud prosecutions, these insiders are the only firsthand witnesses to the fraud. They are the only people who can testify as to 'who knew what, and when,' crucial questions . . . in all complex securities fraud investigations."[55] As the ARB noted in *Johnson*, the principal sponsors of Sarbanes-Oxley and Section 806 "viewed protecting whistleblowers as crucial means for assuring that corporate fraud and malfeasance would be publicly exposed and brought to light from behind the corporate veil."[56]

---

[53] *Id.* at 2.

[54] *Id.*

[55] *Id.* at 10.

[56] *Johnson*, ARB No. 08-032, slip op. at 14.

If the overriding purposes of Sarbanes-Oxley are to be met, employees of contractors, subcontractors, and agents of publicly traded companies must be afforded the same protection against retaliation by their employer that is afforded employees of publicly traded companies. To construe Section 806 otherwise would effectively insulate from liability investment advisors and other private entities that employ virtually all those who perform work for investment companies such as mutual funds that are required to file reports under Section 15(d) of the Securities Exchange Act. Nearly all mutual funds are structured such that they have no employees of their own, and instead contract with, and rely primarily upon, employees of privately-held investment advisors to function. Construing Section 806 as affording whistleblower protection to only employees of publicly traded companies would place employees of investment advisors, the very "insiders" whose reporting of fraud and securities violations Congress sought to encourage, outside the scope of SOX's whistleblower protection. Exclusion of the employees of investment advisors from whistleblower protection would thus defeat Section 806's primary purpose of protecting investors in mutual funds against fraud through the revelations of fraud and securities violations by "insiders" Section 806's protection is intended to encourage.[57]

---

[57] Investment advisors to mutual funds constitute a substantial industry with nearly 157,000 employees managing more

(Continued on following page)

Beyond leaving employees of investment advisors unprotected for reporting potential fraud and securities violations relating to their client funds, construing Section 806 as only protecting employees of publicly traded companies would leave outside accountants, auditors, and lawyers – those most likely to uncover and comprehend evidence of potential wrongdoing – unprotected from retaliation. As previously discussed, Congress was clearly concerned about the role Arthur Anderson [sic] played in the Enron debacle and the retaliation exercised against one of its partners who attempted to blow the whistle. The ARB has previously acknowledged the difficulty in imagining that Congress intended to leave unprotected lawyers who are required under Section 307 of SOX to report evidence of material securities law violations.[58]

To the extent that the Dodd-Frank amendments to Section 806 provide any indication of Congressional intent, it is that broad and unlimited whistleblower protection was intended. It is a well-settled proposition of statutory construction that at the time of any amendments to an existing statute, Congress is presumed to be aware of court and

---

than $12 trillion on behalf of investors. *See 2010 Investment Company Fact Book*, Chapter 1 (available at http://www.icifactbook.org/pdf/2010_factbook.pdf).

[58] *See Jordan v. Sprint-Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 16 (ARB Sept. 30, 2009).

agency interpretations of the existing law.[59] At the time of adoption of Dodd-Frank in 2010, the Department of Labor had issued notice-and-comment regulations explicitly providing that Section 806 applied to employees of contractors, subcontractors, and agents of publicly traded companies. Thus, as Judge Thompson insightfully pointed out in *Lawson*, in enacting Dodd-Frank "Congress had a miles-wide opening to nip Labor's regulation in the bud if it had wished to do so. It did not."

Consideration of the overall statutory framework of SOX lends further support to construing Section 806 broadly to include within its protective coverage employees of contractors, subcontractors and agents of public companies.

We begin our analysis in this regard at its most obvious statutory focal point: with a comparison of the language of Section 806(a) to the explicitly narrower anti-retaliation provision found at Section 501(a) of Sarbanes-Oxley. 15 U.S.C.A. § 78*o*-6(a)(1)(C) prohibits "a broker or dealer and persons employed by a broker or dealer who are involved with investment banking activities" from retaliating against "any securities analyst *employed by that broker or dealer or its affiliates*." (Emphasis added). Congress could

[59] *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

have similarly limited the protection afforded under Section 806(a) but, as previously noted, chose not to do so; resulting in a compelling argument that Congress fully intended a broad extension of whistleblower protection under Section 806.[60]

Equally if not of greater significance to a proper construction of Section 806's employee protection coverage is the larger statutory context within which Section 806 exists. While Section 806's immediate purpose is, as previously noted, the protection of whistleblowers against retaliation by their employers, the provision was enacted as part of a broad and multi-faceted Congressional effort to close gaps in the securities laws that the Enron debacle exposed with the goal of protecting investors and restoring public confidence in the securities market.[61] In furtherance of this over-arching goal, Sarbanes-Oxley consists of

[60] Regarding Section 1107, "[t]he other whistleblower provision found in [SOX]" of which the majority in *Lawson* took note, 670 F.3d at 71, there is no meaningful comparison that can be drawn. Unlike Section 806(a), which expressly affords whistleblower protection to individuals who are wronged, Section 1107, which amended 18 U.S.C.A. § 1513, is an obstruction-of-justice provision that imposes criminal sanctions *upon the wrongdoer* but affords no protection to the wronged individual.

[61] The Senate Judiciary Committee report accompanying adoption of the bill that became Title VIII of SOX, of which Section 806 is a part, describes the bill as "crucial" to "restoring trust in the financial markets by ensuring that corporate fraud and greed may be better detected, prevented and prosecuted." S. Rep. 107-146, at 2. *See Johnson*, ARB No. 08-032, slip op. at 12.

multiple means of combating fraud and protecting investors through numerous diverse and independent statutes and regulatory schemes "designed to improve the quality and transparency in financial reporting and auditing of public companies."[62] Titles I and II of SOX expand oversight and regulation of accounting firms and outside auditors who are not themselves employed by public companies in order to "protect the interests of investors and further the public interest in the preparation of . . . accurate[ ] and independent audit reports for companies the securities of which are sold to, and held by and for, public investors."[63] Title III, entitled "Corporate Responsibility," imposes requirements on publicly traded companies designed to ensure the independence of retained public accounting firms and other professional entities with respect to audits, financial reporting, and securities law compliance.[64] For example, recognizing the significant roles that attorneys and securities professionals can play in both preventing and participating in securities laws violations.[65] Congress included Section 307, which directs the SEC to issue rules regulating the conduct of attorneys retained by a public company in connection with matters involving the public

[62] *Carnero*, 433 F.3d at 9.

[63] SOX § 101, 15 U.S.C.A. § 7211. *See also*, SOX §§ 102-108, 15 U.S.C.A. §§ 7212-7218; SOX §§ 201-206, 15 U.S.C.A. §§ 7231-7234, 15 U.S.C.A. § 78j-1(*g*)-(*l*).

[64] *See* SOX § 301, 15 U.S.C.A. § 78j-1; SOX §§ 302-308, 15 U.S.C.A. §§ 7241-7246.

[65] *See* S. Rep. No. 107-146, at 2-5.

company's securities, regardless of whether the attorney is employed in-house by the company or contractually retained.[66]

Title IV of SOX, governing enhanced financial disclosure requirements, similarly imposes obligations on non-public entities in addition to publicly traded companies.[67] Title V defines codes of conduct and conflict of interest disclosure requirements applicable to outside securities analysts, registered brokers, dealers, and affiliates.[68] Title VI details the SEC's authority to censure or bar from practice outside securities professionals such as brokers, investment advisors, and dealers.[69] Title VII requires the Comptroller General and the SEC to report on securities violations by securities professionals (including public accounting firms, attorneys, brokers, dealers, investment advisors) and on whether investment banks and financial advisors assisted public companies in manipulating earnings or in otherwise

---

[66] 15 U.S.C.A. § 7245 requires the SEC to issue rules, "for the protection of investors," setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of public companies, including the requirement that any attorney engaged on behalf of a public company internally report evidence of violations of securities law or breach of fiduciary duty or similar violation by the company or its agents. *See also* 17 C.F.R. § 205.

[67] *See* SOX §§ 401-408, 15 U.S.C.A. §§ 7261-7266.

[68] SOX § 501, 15 U.S.C.A. § 78*o*-6.

[69] *See* SOX §§ 602-604, 15 U.S.C.A. §§ 77t(g), 78d-3, 78*o*, 14 U.S.C.A. § 80b-3.

disguising their financial condition.[70] Finally, Titles VIII and IX of Sarbanes-Oxley contain broadly applicable provisions imposing criminal liability for securities fraud and obstruction of justice beyond publicly traded companies.[71]

Viewed within this context, it is readily apparent that the identification of publicly traded companies and other entities and individuals against whom Section 806's anti-retaliation bar applies is but a listing, consistent with provisions throughout Sarbanes-Oxley, of the public companies, non-public entities, and individuals whose activities are regulated by federal securities laws. The fact that Congress chose different mechanisms for regulating different non-public entities depending on their respective and varying roles and responsibilities under the securities laws does not negate extension of whistleblower protection under Section 806 to their employees. To the contrary, given the role Section 806 is intended to serve in achieving the larger purposes of Sarbanes-Oxley, whistleblower protection necessarily must be afforded employees of contractors, subcontractors, and agents of publicly traded companies. For example, pursuant to Section 307 of SOX, 15 U.S.C.A. § 7245, an attorney contractually retained as outside counsel to represent a public company before the SEC is obligated to internally report material violations of

---

[70] *See* SOX §§ 701-705, 15 U.S.C.A. § 7201 note.

[71] *See* SOX §§ 802, 807, 902, 906, 18 U.S.C.A. §§ 1348, 1349, 1350, 1519, 1520.

the securities laws by the public company. Failure to do so will result in civil penalties, including censure and prohibition from practice before the SEC.[72] This provision would be rendered virtually meaningless without the whistleblower protection afforded by Section 806(a), particularly where the attorney with knowledge of securities violations is an employee of a law firm that has been contractually retained by a publicly traded company.

Within the overall statutory framework of SOX an even more compelling argument exists for interpreting Section 806(a) as extending whistleblower protection to employees of contractors, subcontractors, and agents when one considers the fact that companies required to file reports under Section 15(d) of the Securities Act such as mutual funds do not themselves have employees. Throughout Sarbanes-Oxley, Congress consistently imposes regulations, obligations, and sanctions upon the contractors, subcontractors, and agents of such companies.[73] These provisions and related SEC rules expanded the reach

---

[72] *See* 17 C.F.R. § 205.

[73] *See, e.g.*, SOX §§ 101-107, 203-206, 602, 802 (regulating public companies' outside auditors and accountants); SOX §§ 201-202, 301 (requiring and regulating contracts between public companies and their outside auditors and accounting firms); SOX § 307 (regulating securities lawyers who are involved "in any way" in a public company's financial disclosures to investors); SOX § 501 (regulating public companies' investment bankers and securities underwriters); and SOX § 806 (regulating public companies' contractors).

of SEC regulations, identifying additional contractors and certain of their employees as covered persons under the securities laws in connection with their employer's contracts to provide to public companies services regulated by the securities laws. Congress's purpose in enacting SOX fully accords with a reading of the statute to afford whistleblower protection coverage under Section 806 to the employees of contractors, subcontractors, and agents who are covered persons under the securities laws.

The fact that Congress previously established a regulatory scheme governing the regulation of public investment companies, such as mutual funds, and the conduct of their investment advisors,[74] does not detract from our conclusion. Because of these prior enactments, obviously, SOX focuses little attention on the regulation of advisors to such public entities. However, it does not follow that, as a result, Section 806(a) does not afford whistleblower protection to employees of private companies under contract to provide investment advice to funds organized under the ICA. It is simply too large a segment of the securities industry to presume that Congress did not intend Section 806 to afford protection to employees of contractors or subcontractors retained as investment advisors. Congress could have easily provided an explicit exception for mutual funds/investment

[74] *See, e.g.*, Investment Company Act of 1940 (ICA), 15 U.S.C.A. § 80a et seq.; Investment Advisors Act of 1940 (IAA), 15 U.S.C.A. § 80b et seq.

funds organized under the ICA, as it did in Section 405, if it had wanted to do so. But Congress did not do so. The ICA and SOX were both enacted to protect investors. It thus requires perverse logic to conclude that Congress intended through a non-intuitive and convoluted combination of two separate Acts, rather than by express statutory language, to exempt the one class of employees from whistleblower protection that would be aware of securities violations by public investment companies, i.e., employees of their contractors, subcontractors, and agents.

Finally, I join my colleagues in referencing the ARB's interpretation of analogous whistleblower statutes, which have been held to afford protection to employees of contractors and subcontractors. Section 806 was based in part on the Wendall H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[75] The relevant provision of AIR 21 is entitled "Discrimination against airline employees," and reads: "No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee."[76] This structure parallels Section 806's: "No company . . . or any . . . contractor, subcontractor or agent of such company, may discharge . . . or in any other manner discriminate against an employee." Just as in Section 806, AIR 21 does not specify

---

[75] *See* S. Rep. 107-146, at 26.

[76] 49 U.S.C.A. § 42121(a).

whether it protects employees of carriers only or whether it protects employees of contractors and subcontractors as well. Nevertheless, as the majority notes, the ARB has construed AIR 21's provision as extending whistleblower protection to employees of contractors and subcontractors of air carriers.[77] The Pipeline Safety Improvement Act of 2009 (PSIA), 49 U.S.C.A. § 60129(a), contains a definition of employer which includes a contractor or subcontractor but no definition of employee. Nevertheless, the PSIA has been interpreted as protecting employees of contractors and subcontractors.[78] Likewise, the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851(a), has also been interpreted to include employees of contractors within its protection despite the fact that, like Section 806, it contains no statutory definition of "employee."[79] These whistleblower statutes share similar statutory language and a legislative intent evidencing similarly broad remedial purposes. Consequently, the ARB has sought to interpret their respective provisions consistently.[80] Congress having

---

[77] *See, e.g., Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, -121; ALJ No. 2006-AIR-022 (ARB June 30, 2009).

[78] *See, e.g., Rocha v. AHR Utility Corp.*, ARB No. 07-112, ALJ Nos. 2006-PSI-001, -002, -003, -004 (ARB June 25, 2009).

[79] *See, e.g., Robinson v. Triconex Corp.*, ARB No. 10-013, ALJ No. 2006-ERA-031 (ARB Mar. 28, 2012); *Hill v. Tenn. Valley Auth.*, Nos. 1987-ERA-023, -024 (Sec'y May 24, 1989).

[80] *See, e.g., Goldstein v. Ebasco Constructors, Inc.*, 1986-ERA-036, slip op. at 4 (Sec'y Apr. 7, 1992); *Poulos v. Ambassador Fuel Oil Co.*, No. 1986-CAA-001, slip op. at 5-7 (Sec'y Apr. 27, 1987).

modeled Section 806 of SOX on the whistleblower protection provisions of the ERA, AIR 21, and PSIA, and employed terms, which have an accumulated settled meaning under those predecessor statutes, I can find no compelling reason to now depart from the Board's practice of construing these whistleblower laws in a consistent fashion.

Section 806 prohibits any "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)), . . . or any officer, employee, contractor, subcontractor, or agent of such company" from retaliating against "an employee" who engages in whistleblower protected activity. By this express language, Congress linked whistleblower protection coverage under Section 806 with the Securities Exchange Act provisions requiring publicly traded companies to fully disclose financial information to investors and the SEC. Congress clearly understood that in order to achieve the Act's overall purposes Section 806 necessarily had to afford whistleblower protection against all entities and individuals involved in securities related activities. Consequently, any reasonable interpretation of employee coverage under Section 806 must preserve this connection between protecting whistleblowers and ensuring compliance with securities law disclosure requirements.

Moreover, it goes without saying that Sarbanes-Oxley in general and Section 806 in particular are remedial in nature. SOX was enacted "to address the systemic and structural weaknesses affecting our capital markets, which were revealed by repeated failures of auditing effectiveness and corporate financial and broker-dealer responsibility in recent months and years."[81] As part of the Corporate and Criminal Fraud Accountability Act of 2002, which became Title VIII of SOX, Section 806 is designed to remedy a company's firing of an employee for reporting fraud or other securities law violations, thereby facilitating SOX's overall purpose of protecting investors and capital markets.[82] The Supreme Court has repeatedly recognized that, "securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'"[83] Thus where Section 806's language and the statutory scheme in which Section 806 resides support a broad reading that comports with its remedial purpose, we read Section 806 as protecting employees of contractors, subcontractors, and agents of public companies from retaliation for engaging in whistleblower protected activities.

---

[81] S. Rep. No. 107-205, at 2 (July 3, 2002).

[82] S. Rep. No. 107-146, at 2.

[83] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-87 (1983) (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963)). *See also Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); SINGER AND SINGER, 3 SUTHERLAND STATUTORY CONSTRUCTION § 60:1 (7th ed. 2010).

Consequently, for the foregoing reasons I concur with the majority in reversing and remanding this case to the ALJ for further proceedings.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

STATUTES AND REGULATIONS INVOLVED

Section 806 of the Sarbanes-Oxley Act of 2002, 116 Stat. 802, provides:

PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES WHO PROVIDE EVIDENCE OF FRAUD.

(a) IN GENERAL. – Chapter 73 of title 18, United States Code, is amended by inserting after section 1514 the following:

"Sec. 1514A. Civil action to protect against retaliation in fraud cases

"(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)), 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

"(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.

"(b) ENFORCEMENT ACTION. –

"(1) IN GENERAL. – A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by –

"(A) filing a complaint with the Secretary of Labor; or

"(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

"(2) PROCEDURE. –

"(A) IN GENERAL. – An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

"(B) EXCEPTION. – Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

"(C) BURDENS OF PROOF. – An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code

"(D) STATUTE OF LIMITATIONS. – An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

"(c) REMEDIES. –

"(1) IN GENERAL. – An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

"(2) COMPENSATORY DAMAGES. – Relief for any action under paragraph (1) shall include –

"(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

"(B) the amount of back pay, with interest; and

"(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

"(d) RIGHTS RETAINED BY EMPLOYEE. – Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.".

(b) CLERICAL AMENDMENT. – The table of sections at the beginning of chapter 73 of title 18, United States Code, is amended by inserting after the item relating to section 1514 the following new item: "1514A. Civil action to protect against retaliation in fraud cases.".

Section 1514A of 18 U.S.C., as amended by the Dodd-Frank Act, 124 Stat. 1848, 1852, provides in pertinent part:

Civil action to protect against retaliation in fraud cases

(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. 780(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 or nationally recognized statistical rating organization, 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. . . .

(2) Procedure. – . . .

(D) Statute of limitations. – An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.

(E) Jury trial. – A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.

Section 42121(b)(1)(B) of 49 U.S.C. provides:

(B) Requirements. –

(i) Required showing by complainant. – The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Showing by employer. – Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) Criteria for determination by Secretary. – The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) Prohibition. – Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

Section 1980.101 of 29 C.F.R. provides in pertinent part:

Company representative means any officer, employee, contractor, subcontractor, or agent of a company.

* * *

Employee means an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative.

Section 1980.102(a) of 29 C.F.R. provides:

(a) No company or company representative may discharge, demote, suspend, threaten, harass or in any other manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, has engaged in any of the activities specified in paragraphs (b)(1) and (2) of this section.