Rejecting the George Clooney Defense, Supreme Court Upholds Protection of Whistleblowers in the Private Sector. What Does it Mean for Your Company?

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Recently, the Supreme Court affirmed that many employees of private companies are entitled to protection against retaliation when they blow the whistle on misconduct just like employees of publicly-traded companies. *Lawson v. FMR, LLC*, 571 U.S. – (Mar. 4, 2014). Perhaps it was wishful thinking, but before this decision many believed that the Sarbanes-Oxley Act, which was passed in the wake of the Enron scandal, was limited to staving off fraud in the public sector. But two private employees, whose employers had contracted to advise and manage publicly-traded mutual funds, felt differently. After they reported potential fraud related to the mutual funds, they were retaliated against and lost their jobs. Aggrieved, the employees sued, seeking protection as whistleblowers under Sarbanes-Oxley.

The defendant-employers moved to dismiss the employees' lawsuits, contending that the Sarbanes-Oxley Act's whistleblower protections do not reach employees of private companies. Although the trial court rejected that contention, the employers' argument got traction in the First Circuit Court of Appeal, where a divided court held that the Act only covers employees of public companies. Shortly after the First Circuit rendered its decision, the Department of Labor's Administrative Review Board issued a directly contrary opinion in an unrelated case. Faced with a conflict between the First Circuit and the federal agency designated by Congress to interpret and enforce whistleblower protections, the Supreme Court granted certiorari to resolve the matter, and in a 6-3 decision, held that Congress afforded whistleblower protection to employees of private companies who provide services to public companies.

The Supreme Court started with the plain language of the statute, which, when stripped to plainer English states that: "No [public] company . . . or any officer, employee, contractor, subcontractor, or agent of such company, may . . . [retaliate against a whistleblower employee]." 18 U.S.C. § 1514A.

The Court held that the employer's interpretation of the Act's language was nonsensical for a number of reasons. First, it required the Court to add words to the statute that Congress did not see fit to include when it drafted the provision, namely inserting the phrase "of a public company" after "employee." Second, the employer's interpretation would require a contractor to retaliate against another company's employee for the reference to "contractor" to have any meaning. However, outside contractors rarely, if ever, have the power to fire or demote another company's employees.

That's where the George Clooney defense comes in, which had some sway over Justice Sotomayor, who drafted the dissenting opinion. The employers conceded that contractors rarely have firing power over another company's employees, but argued that when Congress drafted this provision, it must have been thinking of George Clooney, or at least the "corporate downsizer" position he later held in the 2009 film *Up in the Air*. That is, the employers argued that the use of "contractor" in the whistleblower statute must have been intended to close a loophole that would have allowed public companies to evade liability by hiring an outsider to come in and do its dirty work. But, when pressed to offer a non-fictionalized, real-world example of a situation in which an outside contractor would have employment decisionmaking authority over a public company's employees, the defendant employers could think of none, and the Court declined to attribute such a constrained motive to Congress.

It was also notable to the Court that upon closer dissection of the Enron scandal, outside, contracting professionals, such as Enron's outside accountants and lawyers, were directly complicit in Enron's fraud. A handful of employees from outside of Enron who did speak up—from Merrill Lynch to Arthur Anderson—were swiftly dealt with, not by Enron, but by their private employers at Enron's behest. When passing Sarbanes-Oxley's whistleblower protections, Congress considered that such professionals normally have the best opportunity to witness investor fraud and to report it, and that, if protected, those whistleblowers could help prevent the next Enron or WorldCom.

The Court dismissed a few other technical arguments lobbed up by the employers, including the argument that the statute's short-hand titles should control over the otherwise plain and involved language in the statute itself. Then, the employers threw their Hail Mary, arguing that if whistleblower protections were not limited just to employees of public companies, that the whistleblower protections would extend to every nanny, housekeeper, or gardener working for every CEO in America, and surely, Congress did not intend to give whistleblower protections to domestic employees. Again, the majority of the Court was not swayed. While it was *possible* that a housekeeper could sue for retaliation as a whistleblower under what was deemed an unintended loophole resulting from a drafting error, the Court believed the possibility that a domestic employee might uncover evidence of mail, wire, or investor fraud to be sufficiently remote. In any event, the Court invited Congress to fix its mistake.

The *Lawson* decision has received a fair amount of press since the opinion was rendered; after all, it is a rare Supreme Court decision that mentions George Clooney. But cutting through the headlines, what does the *Lawson* decision really mean for your company? It means that if you are a private employer and you contract with, provide services to, or serve as the agent of a publicly-traded company, you need to ensure that your employees are not retaliated against for blowing the whistle on fraud.

If you would like assistance in reviewing your policies against retaliation, or if you have questions about the *Lawson* decision and how it may affect your business, please call Jennifer Shelfer or any member of Arnall Golden Gregory LLP's Employment Law Team.

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