



In the Matter of:

JOHN T. GRIFFO,

ARB CASE NO. 2018-0029

COMPLAINANT,

ALJ CASE NO. 2016-SOX-00041

v.

DATE: MAY - 2 2019

BOOK DOG BOOKS, LLC,
ROBERT WILLIAM HOLDINGS, LLC,
and ROBERT WILLIAM
MANAGEMENT, LLC,

RESPONDENTS.

Appearances:

For the Complainant:

John T. Griffo; *pro se*; London, Ohio

For the Respondents:

Gary S. Batke, Esq. and Jolene S. Griffith, Esq.; *Bailey Cavalieri LLC*,
Columbus, Ohio

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A
Haynes and Daniel T. Gresh, *Administrative Appeals Judges*

FINAL DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provision of the Sarbanes-Oxley Act of 2002 (SOX), as codified at 18 U.S.C. § 1514A (2010) and its implementing regulations at 29 C.F.R. Part 1980 (2018). Complainant John Griffo filed a complaint alleging that Respondents Book Dog Books, LLC, Robert William

Holdings, LLC, and Robert William Management LLC (Respondents) terminated his employment in retaliation for engaging in SOX-protected activities. A Department of Labor Administrative Law Judge (ALJ) dismissed the complaint, determining that the Respondents are not covered employers under the SOX. We affirm the ALJ.

BACKGROUND

The Respondents are not publicly traded companies and their business is the purchase, rental, and sale of text books. As part of their business, the Respondents sell books through Amazon.com, Inc. (Amazon) and Amazon has a contractual right to purchase shares of Book Dog Books. The Respondents also have accounts with PNC Bank, a subsidiary of PNC Financial Services Group, Inc. (PNC). Amazon and PNC are publicly traded companies.

Complainant was the Chief Financial Officer of Book Dog Books. His job duties included performing audits of the Respondents' financial accounts and book inventory. In November 2015, he complained to various entities, including PNC, about financial and inventory inconsistencies at Book Dog Books. In the record before us, Complainant at no time alleges that he performed contractual services for PNC, Amazon or any other entity with which the Respondents had a contract.

The Respondents discharged Complainant on November 12, 2015. On May 9, 2016, Complainant filed a SOX complaint with the Occupational Safety and Health Administration (OSHA) alleging that the Respondents had engaged in fraud and discharged him for reporting that fraud. OSHA denied the complaint and Complainant requested a hearing before an ALJ.

On September 20, 2017, the Respondents filed a Motion for Summary Decision (Motion), to which Complainant filed a response. On December 7, 2017, the ALJ issued an Amended Decision and Order¹ concluding that the Respondents were entitled to summary decision as a matter of law because they were not covered employers under the SOX. Complainant appealed the ALJ's ruling to the Board.

JURISDICTION AND STANDARD OF REVIEW

¹ The ALJ originally issued a Decision and Order on November 22, 2017, but because that document did not include a notice of appeal rights, the Amended Decision and Order was issued to include the notice of appeal rights

The Secretary of Labor has delegated to the Board the authority to act on appeals from ALJ decisions arising under the SOX and to issue final agency decisions in those matters.² The ARB reviews an ALJ's grant of summary decision de novo. . Summary decision is permitted where "there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law."³ On summary decision, the ALJ, in the first instance and the Board on appeal must review the record in the light most favorable to the non-moving party.⁴

DISCUSSION

Congress enacted the SOX on July 30, 2002, as part of a comprehensive effort to detect and punish corporate fraud. The employee-protection provision of SOX prohibits covered publically traded companies from retaliating against employees who provide information or assist in investigations related to certain fraudulent acts.⁵ A "contractor" of a covered publically traded company is also covered under this provision and the definition of that term presents the legal issue in this appeal.

² Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019).

³ 29 C.F.R. § 18.72(a) (2018).

⁴ *Micallef v. Harrah's Ricon Casino & Resort*, ARB No. 2016-0095, ALJ No. 2015-SOX-00025, slip op. at 3 (ARB July 5, 2018).

⁵ 18 U.S.C. § 1514A provides as follows:

(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)), including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such 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 in the terms and conditions of employment because of any lawful act done by the employee --

The Respondents assert that they contracted with Amazon only to sell, purchase and rent books, and with PNC Bank to obtain a line of credit. Motion at 17-18. Respondents argue that, based on the United States Supreme Court's ruling in *Lawson v. FMR, LLC*⁶ and the analysis that the United States District Court for the Eastern District of Pennsylvania applied in its ruling in *Gibney v. Evolution Marketing Research, LLC*,⁷ these relationships are not of a nature which would cause them to be covered "contractor[s]" under § 1514A.

Complainant points to the Respondents' commercial relationships with Amazon to argue that Respondents are covered "contractor[s]" under SOX. Complainant asserts that the Respondents and Amazon were involved in "contractual relationships [that] are way more compelling than those described in

(1) to provide information, cause information to be provided, or otherwise assist in any 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; . . . 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 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.^[5]

⁶ 571 U.S. 429 (2014).

⁷ 25 F.Supp. 3d 741 (E.D. Pa. 2014). The ALJ cited to *Gibney* in his opinion as it provided a persuasive analysis of the United States Supreme Court's decision in *Lawson*.

Lawson.”⁸ The ALJ considered the parties’ assertions and other evidence of record and concluded that the Respondents are not contractors under the SOX. We agree.

In *Lawson* the petitioners (Lawson and Zang) were employees of investment advisors providing professional services under contract to several publicly traded mutual funds. Lawson alleged that she was discharged for reporting accounting practices that overstated expenses associated with the funds management. Zang alleged that he was discharged for expressing concerns about inaccuracies in a draft registration statement prepared on behalf of the funds. The respondents in *Lawson* argued that the SOX only prohibited contractors from retaliating against the employees of publicly traded companies. The United States Supreme Court held that 18 U.S.C. § 1514A also prohibits, under certain circumstances, contractors from retaliating against their own employees for engaging in the same whistleblowing activities that would be protected under the SOX if the employees of the publicly traded company had engaged in them. The Court emphasized that the contractor’s employees in *Lawson* were covered because their employment tasks could implicate shareholders of the publicly traded companies.⁹ But the Court also stated that it was not determining that all businesses that contract with publicly traded companies were to be treated as “contractors” under § 1514A.¹⁰

⁸ See Complainant’s Objection to Respondents Book Dog Books, LLC, Robert William Holdings, LLC, and Robert William Management LLC’s Motion for Summary Decision and Complainant’s Request for Federal Assistance in Pursuing This SOX Claim at 7.

⁹ See *Lawson*, 571 U.S. at 454 (“The potential impact on shareholders of false or misleading registration statements needs no elaboration. If Lawson and Zang’s allegations prove true, these plaintiffs would indeed be ‘firsthand witnesses to [the shareholder] fraud’ Congress anticipated § 1514A would protect. S. Rep., at 10.”).

¹⁰ *Id.* (“[T]he Solicitor General suggests that we need not determine the bounds of § 1514A today, because plaintiffs seek only a “mainstream application” of the provision’s protections We agree. Plaintiffs’ allegations fall squarely within Congress’ aim in enacting § 1514A . . . If Lawson and Zang’s allegations prove true, these plaintiffs would indeed be “firsthand witnesses to [the shareholder] fraud” Congress anticipated § 1514A would protect. S. Rep., at 10.”). The Court also noted in *Lawson* that the publicly traded mutual funds which were covered under the SOX had no employees. Instead, contractual investment advisors did all the work for the publically traded mutual funds. *Id.* at 437, 450. The plurality opinion observed that if § 1514A was to cover any protected activity, it must be the protected activity of an employee of a contractor. *Id.* at 459. The dissenting opinion in *Lawson* asserts that the plurality opinion fails to offer any convincing principle that would limit the expansion of SOX jurisdiction to all contractual employees, either a business or individual, of the covered persons and entities set forth in § 1514A. *Id.* at 462-480.

In *Gibney*, a federal district court applied *Lawson* to a dispute in which the plaintiff alleged that his former employer discharged him after he complained about a business plan he believed would result in fraudulent billing of a publicly traded company. The plaintiff's former employer was a contractor of the publicly traded company. *Gibney* argued that, as the employee of a business which had a contract with a publicly traded company, his complaints about the business plan were protected under § 1514A. The district court granted the respondent's motion to dismiss, concluding that *Gibney* was "advocat[ing] for an impermissibly broad definition of SOX protection that was neither intended by Congress nor contemplated by the Supreme Court in *Lawson*:"

Here, however, Plaintiff has not alleged that he blew the whistle on fraud committed by Merck (either acting on its own or acting through contractors like Evolution). Rather, Plaintiff is alleging that Evolution committed fraud against Merck. Thus, based on Plaintiff's allegations, Merck is the victim of fraud rather than its perpetrator. Nothing in the text of § 1514A or the *Lawson* decision suggests that SOX was intended to encompass every situation in which any party takes an action that has some attenuated, negative effect on the revenue of a publicly-traded company, and by extension decreases the value of a shareholder's investment. As Evolution argues, extending SOX's protections in this way presents obvious "overbreath" (sic) concerns that risk "mak[ing] SOX a general anti-retaliation statute applicable to any private company that does business with a public company."¹¹

While the SOX does not contain a definition of the word "contractor" applicable to § 1514A, other courts have considered the term in this context after the decisions in *Lawson* and *Gibney* were issued. We agree with those courts that an employee cannot invoke SOX protection simply because his employer is a party to a contract with a publicly traded company.¹² We hold that, at a minimum, a

¹¹ *Gibney*, 25 F.Supp. 3d at 748.

¹² See, e.g., *Reyher v. Grant Thornton, LLP*, 262 F. Supp. 3d 209, 217 (E.D. Pa. 2017) ("A purported whistleblower employed by a private company cannot invoke the protections of section 1514A simply because her employer happens to contract with public companies..."); *Anthony v. Nw. Mut. Life Ins. Co.*, 130 F. Supp. 3d 644, 652 (N.D.N.Y. 2015)

“contractor” under § 1514A must actually perform a service for a publicly traded company.¹³

On the facts of this case, the Respondents were customers of both Amazon and PNC, but the record below does not establish that the Respondents performed any service for either Amazon or PNC. The Respondents assert that Book Dog Books “is a simple customer of PNC Bank under a line of credit PNC has issued Book Dog.”¹⁴ Complainant does not rebut this assertion.

Likewise, Respondent Book Dog Books sold books through Amazon, but Complainant’s response to the Motion for Summary Decision does not allege facts or provide evidence to show that Book Dog Books provided any service to Amazon.¹⁵ Assuming Complainant’s accusation that the Respondents intended to commit fraud *against* Amazon is correct, a contractor’s actions can be “too far removed from potentially harming the shareholders of a publicly traded company to be covered under § 1514A.”¹⁶ Such was the case here.

(“A private company’s fraudulent practices do not become subject to § 1514A merely because that company incidentally has a contract with a public company.”).

¹³ Cf. “Contractor,” BLACK’S LAW DICTIONARY (10th ed. 2014) (defining the term to include both “[a] party to a contract” and “one who contracts to do work for or supply goods to another”). *But see Yates v. United States*, U.S. , 135 S.Ct. 1074, 1081-82, 191 L.Ed.2d 64 (2015) (“Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, ‘[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.’”) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341(1997)).

¹⁴ Motion at 18.

¹⁵ Complainant’s failure to do so means that the issues *Lawson* raised are not reached. The Respondents cannot be “contractors” within the meaning of § 1514A unless there is some showing that they provided services as a contractor to Amazon and PNC beyond being their customer. Virtually every business contracts for, as examples, cell phone and computer services, insurance, vehicle and equipment rentals, banking and financial services, real estate, employee health and retirement benefits, and advertising, and these business relationships may be with covered publically traded companies under the SOX. But there is no basis for presuming that the term “contractor” under §1514A of the SOX embraces all of these generic business activities merely because a contract may govern the rights of the parties.

¹⁶ *Brown v. Colonial Sav. F.A.*, No. 4:16-CV-884-A, 2017 WL 1080937 at *4 (N.D. Tex. 2017).

Complainant has failed to establish a genuine issue of material fact on the question of whether the Respondents are “contractor[s]” pursuant to the SOX.

CONCLUSION

The Respondents are entitled to summary decision as a matter of law. Accordingly, we **AFFIRM** the ALJ’s Amended Order Granting Respondent’s Motion for Summary Decision and **DENY** the complaint.

SO ORDERED.