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Tip of the Month

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SOX Protection Extended Abroad

Traditionally, American corporations had no reason to fear a whistleblower claim under the Sarbanes-Oxley Act ("SOX") brought by an employee of a foreign affiliate alleging retaliation for violations of foreign law. A recent decision by Judge Victor Merrero from the Southern District of New York has cast that understanding in considerable doubt. Multinational companies are understandably alarmed over the extent that this decision will affect them.

This Month's CHALLENGE

Sarbanes-Oxley's whistleblower liability may stretch to allegations of violations of foreign laws by foreign affiliates.

Best Practice Tip of the Month

Don't assume that decisions affecting workers abroad are immune from SOX liability. Decisions by US companies that adversely affect Americans working abroad may give rise to a SOX retaliation claim.

Background

In *O'Mahony v. Accenture*, 07 Civ. 7916, plaintiff Rosemary O'Mahony alleged that Accenture LTD, a Bermuda corporation, and its U.S. subsidiary, Accenture LLP, retaliated against her in violation of the SOX whistleblower protection statute. O'Mahony worked at Accenture LLP in America from 1984 to 1992 before she left to work at Accenture SAS (Accenture's French subsidiary). Although this assignment was meant to be temporary, O'Mahony continued to work in France until 2006. O'Mahony claimed that she told the U.S. company that after five years it was required to pay French social security contributions on her behalf, and that she objected to the alleged "tax fraud" when the company decided not to do so. When O'Mahony was subsequently demoted in grade and reduced in salary, she brought a SOX whistleblower claim in New York, asserting that the decision to punish her had been made here. Accenture's motion to dismiss O'Mahony's claims was denied by Judge Marrero.

Was suit properly brought in U.S. Courts?

Section 1514(a)(1) of SOX provides "whistleblower" protection to employees who provide information concerning what the employee reasonably believes is securities fraud or certain other kinds of illegal conduct. *See* 18 U.S.C. § 1514(a)(1). Defendants argued that this section should not apply "beyond the territorial jurisdiction of the United States" in accordance with the Second Circuit decision of *Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 70 (2d Cir. 1994). Additionally, defendants relied on a First Circuit decision, where a foreign citizen who worked for a foreign subsidiary unsuccessfully brought suit against the domestic parent company. *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006). In *Carnero*, the First Circuit held that § 1514(a)(1) did not extend to a foreign employee who was wronged by an "overseas subsidiary."

The Southern District in *O'Mahony*, however, distinguished the *Carnero* decision for a myriad of reasons, most of which beg the question of how the lines of "extra-territorialism" should be drawn. First, unlike Carnero, O'Mahony was "employed and compensated exclusively" by a domestic subsidiary corporation – not a foreign corporation. Thus, the court contended that it had allayed concerns about

whether its decision would unlawfully interfere "with the employment relationship of a foreign employer and their foreign employees." Second, the retaliation in *Carnero* occurred abroad, whereas the decision to retaliate against the plaintiff in *O'Mahony* was made in the United States by domestic executives and employees. Third, the court pointed out that O'Mahony brought suit against the foreign parent corporation, Accenture LTD, and its domestic subsidiary, Accenture LLP, for the domestic subsidiary's wrongdoing. Conversely, in *Carnero*, the plaintiff brought suit against the domestic parent corporation for misconduct abroad by its foreign subsidiary, further distinguishing *Carnero* from the present facts.

In sum, the District Court held that the commission of the alleged fraud and decision to retaliate against O'Mahony, "occurred primarily in the United States." According to the court, the plaintiff was not seeking to correct French social security violations, but rather was seeking redress for violations of United States law under SOX, even though the only wrongful conduct that the employee claimed to have complained about was an alleged failure to pay French social security tax. In addition to finding the requisite domestic connection to Accenture's conduct, the court also found that Accenture's alleged fraudulent conduct was "material," and had a "causal connection" to the domestic determination to demote plaintiff.

Defrauding Shareholders

The District Court also considered whether § 1514(a)(1) protects only those individuals who report conduct involving "fraud against shareholders." In finding that the statute was not so limited, the court considered principles of statutory construction. Specifically, the court held that the "unambiguous" language of § 1514(a)(1) enumerated six forms of misconduct, that if performed, subject a corporation to liability. Ultimately, the court held that these provisions are independent and disjunctive, and only one of them requires an allegation that the alleged misconduct was intended to defraud shareholders. Here, O'Mahony claimed that 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud) were violated in connection with the alleged failure to pay French social security taxes, and Judge Merrero held that this was sufficient to state a claim under SOX. It was unnecessary for O'Mahony to separately allege that there was "defrauding of shareholders" to proceed with her claim.

Multinational corporate disaster or false alarm?

In the wake of *O'Mahony*, multinational corporations are justifiably concerned about the implications of the Southern District decision. Normally, absent an express Congressional statement, SOX and other domestic laws would not apply extra-territorially. However, *O'Mahony* potentially blurs the line that *Carnero* created, and extends SOX liability where it previously has been limited. There are many permutations of the factual scenario presented in *O'Mahony*. At its broadest, this case may extend the U.S. courts into every kind of dispute between a foreign executive and a foreign affiliate.

It is difficult to say with any certainty how any of these variations would fare under *O'Mahony* and whether this decision will lead to an explosion of lawsuits against multinational companies that previously had not faced SOX liability. However, it would be prudent for executives and officers of multinational corporations at a minimum to consider § 1514(a)(1) in light of the *O'Mahony* decision and be cognizant of its potential consequences.

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