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Cross-Border Whistleblower Protection

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The fraud scandals that rocked the U.S. economy at the beginning of this decade have led governments to re-examine legislation to protect whistleblowers. In the last issue of this newsletter, Karl Gustafson discussed Canada's amendments to the *Criminal Code.* In this issue, we look at a recent New York District Court decision that arguably extends whistleblower protection to employees working outside the U.S.

In 2002, the U.S. enacted the *Sarbanes-Oxley Act,* commonly referred to as SOX. Among other things, the intent was:

> To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.

To further this goal, the Act provides a private right of action to any employee of a publicly traded company who suffers retaliation for reporting fraud. If successful, the employee may be entitled to relief that includes back pay, reinstatement and compensatory damages.

To succeed in a whistleblower claim under SOX, the following must be shown:

- the employee engaged in "protected activity," (reporting to the U.S. government or a supervisor at their place of employment information that the employee reasonably believes relates to fraud);
- the employer knew of the protected activity;
- the employee suffered an "unfavourable personnel action," including termination, demotion or any other negative treatment that would reasonably be likely to deter other whistleblowers; and
- it can be seen that the protected activity was a contributing factor to the unfavourable action.

SOX Stays Local

Since enactment, U.S. courts have declined to apply the SOX whistle¬blower provisions to employees working outside the U.S. For example, in 2006, a federal appeals court held in *Carnero v. Boston Scientific Corp.* that the SOX whistleblower provisions: "do not reflect the necessary clear expression of congressional intent to extend its reach beyond our nation's borders."1

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In *Carnero*, an Argentinean citizen, residing in Brazil, sued Boston Scientific, the U.S. parent of his former Latin American employer. Carnero alleged that Boston Scientific had terminated him in retaliation for informing it about fraud occurring at two Latin American subsidiaries. The Court decided that "a foreign employee complaining of misconduct abroad could not bring a claim under [the SOX whistle¬blower provisions] against the United States parent company," and also noted the potential problems that would ensue if U.S. courts were to "delve into the employment relationship between foreign employers and their foreign employees."2

SOX Goes Global

On February 5, 2008, however, the U.S. District Court for the Southern District of New York issued a decision to the effect that the SOX whistle-blower provisions may indeed, under certain circumstances, apply to em¬ployees working outside the U.S.

In *O'Mahoney v. Accenture LLP,*3 an employee of Accenture's French subsidiary, who was working and living in France, claimed that she had suffered retaliation in violation of the SOX whistleblower provisions for reporting fraud relating to certain social security (or pension) payments that Accenture was obligated to make to the French government. Accenture relied on *Carnero*, and sought to have O'Mahoney's complaint dismissed on the grounds that she was employed outside the U.S. and that SOX had no extraterritorial application.

In refusing to dismiss the complaint, the Court distinguished *Carnero* on three grounds:

- O'Mahoney worked in the U.S. for Accenture for eight years before being transferred to France, and even after her transfer, she was compensated by the U.S. entity for another 12 years. As a result, the Court put little weight on the fact that, for the two years before her complaint, O'Mahoney was an employee of Accenture's French subsidiary. In contrast, Carnero was a foreign employee, employed and compensated exclusively by overseas subsidiaries of a U.S. company.
- Secondly, the fraud in *O'Mahoney* allegedly occurred in the U.S., when Accenture executives in New York and California decided not to pay contributions owing under the Franco-American Social Security Agreement, and then demoted O'Mahoney for saying she would not be a "party to tax fraud." In *Carnero*, the wrongful conduct giving rise to the claim occurred in Latin America.
- Finally, O'Mahoney brought her action against a foreign (Bermuda) parent and its U.S. subsidiary for the alleged misconduct of the U.S. subsidiary in the U.S. The Carnero complaint was against a U.S. parent company for the alleged misconduct abroad of its Latin American subsidiary.

Canadian Impact

For Canadians, *O'Mahoney* teaches that the SOX whistleblower provisions may apply to employees working in Canada for a company publicly listed in the U.S. if:

- the employee has some history of working for a U.S. entity related to the employer (even if at the time of the complaint, the employee happens to be working for a foreign entity); and
- the decisions to engage in fraud and to retaliate were made within the U.S.

Companies with publicly traded securities in the U.S. would be well advised to consider adopting effective whistleblower policies in their efforts to comply with the SOX provisions. See the Winter 2007/2008 issue of this newsletter for Karl Gustafson's discussion of the characteristics and need for such a policy.4

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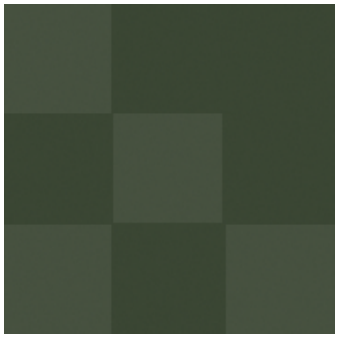
1 *Carnero v. Boston Scientific Corp*, 433 F.3d 1, 18 (1st Cir. 2006).
2 Id. at 15.
3 07 Civ. 7916 (VM) (S.D.N.Y. Feb. 5, 2008).
4 Karl Gustafson's article is available through this link



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