A Timely Analysis of Legal Developments

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Can SOX Go Overseas? The Debate Continues

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The continuing controversy over whether retaliation claims under the Sarbanes-Oxley Act ("SOX") cover activities outside the United States continues to play out in the courts and administrative bodies. The two leading cases in this area are the First Circuit's ruling in *Carnero v. Boston Scientific*,[1] and the U.S. District Court for the Southern District of New York's holding in *O'Mahony v. Accenture, Ltd.*[2] These decisions took somewhat divergent paths, giving employers little clear guidance on whether they might face such claims for their activities or the activities of their subsidiaries and affiliates outside the country.

In that light, the Fifth Circuit's recent decision in *Villanueva v. United States Department of Labor*,[3] is important. In some respects, the decision is helpful to employers, but its reasoning gives cause for concern about how courts will answer this question in the future.

In *Villanueva*, the plaintiff was a Colombian citizen working in that country for an affiliate of a Dutch company, the stock of which was publicly traded in the United States. The plaintiff alleged that he notified managers at both his Colombian employer and its Dutch parent of his belief that certain practices of the parent corporation enabled it to engage in fraudulent underreporting of its income to Colombian tax authorities. The only connection between his allegations and the United States was the claim that officials of an affiliated company in Houston directed some portions of the activity that led to the underreporting. Plaintiff was later passed over for a pay raise at the Colombian employer and ultimately terminated. He claimed that both actions were in retaliation for his reporting what he claimed was tax fraud.

Following dismissal of the claim both by an administrative law judge and on appeal by the administrative law judge, the plaintiff appealed to the Fifth Circuit. Although the court affirmed the dismissal of the complaint, its reasoning raises concerns. The court held that the issue was not whether SOX could be applied in an extraterritorial manner, but whether the plaintiff had engaged in protected activity at all. It found that the plaintiff's original complaint to the Occupational Safety and Health Administration (OSHA), where SOX claims must be filed first, alleged that he had been subjected to retaliation because of tax fraud in Colombia, at the express direction of executives in Houston who used mail, email and telephones to accomplish the fraud. However, as the court pointed out, at no juncture in the case did the plaintiff assert directly that actions taken in the

1 433 F.3d 1 (1st Cir. 2006).

2 537 F. Supp.2d 506 (S.D.N.Y. 2008).

3 Case No. 12-60122 (5th Cir. Feb. 12, 2014).

U.S. violated any domestic laws. Critically, he did not assert that the employees in Houston had engaged in activities that violated mail, bank, wire or securities fraud statutes, triggering events for a SOX claim.

In this sense, the decision represents a win for employers. They avoided a ruling that could have explicitly given SOX extraterritorial effect or found that fraudulent conduct in another country involving violation of that country's statutes was sufficient to establish a SOX claim.

However, there are some ominous signs in the decision that employers should note. First, the court suggested that if the plaintiff had alleged violation of U.S. mail or wire fraud statutes by the Houston officials, the result might have been different. By claiming that the Texas employees had orchestrated violations of Colombian tax law, instead of claiming that they had violated American mail and wire fraud statutes, the plaintiff may have pleaded himself out of a cause of action.

In addition, the court cited favorably to the ruling of the Administrative Review Board (ARB), which is generally considered to be more employee-leaning, in *Sylvester v. Parexel Int'l LLC*.[4] In that decision, the ARB held that to make out a SOX claim, the court or administrative body must determine whether the employee reported conduct that he or she reasonably believed constituted a violation of federal law. Thus, the employee does not have to be right when claiming that the employer's conduct violated federal law. In addition, the employee's report to the company need not cite a specific section of the law allegedly being violated. As long the employee identifies the specific conduct claimed to be illegal, he or she has engaged in protected activity protected by SOX.

As a result, whether SOX claims cover overseas conduct remains unresolved. It would appear that conduct taking place in a foreign country that allegedly violates foreign laws and has its impact outside the U.S. does not offer SOX protection to the reporting employee. However, an allegation that U.S. employees assisted in the illegal conduct, and that they violated American laws in doing so, appears more likely to be accepted by the courts and administrative agencies as stating a valid SOX claim. Defending such allegations will likely entail focusing on what the employee said in his or her internal report about the conduct, if there was an internal report, and how and why the employee came to an allegedly reasonable belief that the U.S.-based conduct violated U.S. statutes so as to constitute protected activity.

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4 ARB No. 07-123, 2011 WL 2165854 (ARB, May 25, 2011).