Legal Opinion Letter

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FOREIGN WORKERS CANNOT SUE UNDER "SOX" WHISTLEBLOWER PROVISIONS

by
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In a significant win for businesses with employees working in foreign countries, the U.S. Court of Appeals for the First Circuit decided on January 5, 2006 that the whistleblowing protections of the Sarbanes-Oxley Act ("SOX") do not extend to foreign citizens working outside the United States for foreign subsidiaries of companies covered by SOX. *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006). In its ruling, the first decision on this issue by a U.S. Court of Appeals, the court dismissed the whistleblowing claim that Ruben Carnero ("Carnero") brought against Boston Scientific Corporation ("BSC").

Background. Carnero is an Argentine citizen who was employed by Boston Scientific Argentina and who also performed services for Boston Scientific Brazil until he was terminated in August 2002. In addition to seeking statutory severance benefits under the laws of Argentina and Brazil, Carnero brought a whistleblowing retaliation claim under SOX seeking additional damages, including the value of stock options. He asserted that he was terminated for allegedly reporting certain accounting practices at the company's Latin American subsidiaries that he claimed were improper. When the Department of Labor ("DOL") did not move forward with Carnero's claim within 180-days of its filing, Carnero filed a complaint in the U.S. District Court for Massachusetts. The District Court granted BSC's motion to dismiss that complaint and a related common law whistleblowing claim in 2004.

On appeal, Carnero argued that the policy objective of SOX to safeguard the domestic securities market from improper accounting practices would be thwarted if the whistleblower protections were not extended outside the United States. BSC countered by pointing to specific details in the SOX statute and legislative history suggesting that Congress was principally concerned with domestic whistleblowing issues emanating from the Enron scandal and that there was an insufficient basis to overcome the presumption against extraterritorial application of U.S. laws. The three-judge panel unanimously adopted BSC's argument in affirming BSC's victory at the District Court level.

Carnero has not yet indicated whether he will seek review by the Supreme Court.

The *Carnero* Decision. The Court of Appeals began with the well-established principle that there is a presumption against extraterritorial application of congressional legislation. A court must assume that Congress legislates with an awareness of this presumption, which can only be overcome when Congress

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clearly expresses a contrary intention. The Court of Appeals found several factors particularly persuasive in determining that Congress did not intend to apply the whistleblowing provisions of SOX ("Section 806") extraterritorially.

First, the Court of Appeals contrasted Section 1107 of SOX, which provides criminal sanctions for retaliation against anyone giving truthful information to law enforcement officers relating to the commission of a federal offense, and contains an express provision for extraterritorial jurisdiction, with Section 806, which does not. As the court noted, "[t]hat Congress provided for extraterritorial reach as to Section 1107 but did not do so as to Section 806 . . . conveys the implication that Congress did not mean Section 806 to have extraterritorial effect."

Second, the Court of Appeals noted that nothing in the legislative history of Section 806 provides any evidence of congressional intent to apply the whistleblower provisions extraterritorially. Quoting Senator Patrick Leahy (D-VT) at length (the senator who introduced the original version of the statute), the court concluded that the debate focused on the failure of many state laws to protect whistleblowers, not protection of employees outside the United States. Although Carnero countered that Senator Leahy had stated the statute was "intentionally written to sweep broadly," the court concluded that, read in context, that statement was once again focusing on the need for federal protection where state law did not protect whistleblowers as opposed to focusing on any need for protection of whistleblowers overseas. In contrast, the court noted that the legislative history of certain other SOX provisions demonstrated an express consideration of the application of those provisions overseas.

Third, the court pointed to other factors supporting the conclusion that Section 806's whistleblower protection was not intended to apply extraterritorially. The court explained that if Section 806 were given extraterritorial reach in this case, it would empower U.S. courts and/or agencies to interfere with the employment relationship between foreign employers and their foreign employees. That Congress did not discuss or consider the problems with imposing U.S. labor standards on other countries was indicative of congressional intent to limit Section 806's application. Likewise, Congress did not provide any mechanism for enforcing Section 806 in a foreign setting. It did not provide the Department of Labor with extraterritorial investigatory powers, did not provide for interpreters and did not consider the use of foreign personnel. Also, the court noted that the relatively short time period in which the DOL must complete its entire investigation of the complaint was unrealistic if the DOL were expected to conduct overseas investigations.

Finally, the court noted that the DOL has issued at least three preliminary rulings that Section 806 does not apply extraterritorially to employees working outside of the United States. The court concluded that these determinations were entitled to some weight given that the DOL is the agency designated by Congress to interpret and enforce Section 806.

Conclusions. The *Carnero* decision provides a useful line of defense for employers that are faced with whistleblowing claims by foreign employees. However, employers should still act with appropriate caution when terminating employees who may have engaged in whistleblowing activity because it is conceivable that the employee may try to file claims against the employer under foreign law or may try to assert that the termination breached contractual obligations allegedly established through the company's internal code of conduct.[1]

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[1]A comprehensive legal overview of employee whistleblower claims, including a detailed section on the protections afforded under SOX, is available on Goodwin Procter LLP's website at: http://www.goodwinprocter.com/publications/LE_SOX_whistleblow_05_04.pdf.