O'Mahony v Accenture Ltd

United States District Court, Southern District of New York. No. 07 Civ. 7916. 7 February 2008

A US Court rules on the applicability of whistleblowing protections to employees of US-listed companies based overseas.

The US Sarbanes-Oxley Act ('SOX'), enacted in 2002 in response to a series of highly-publicized financial scandals at several of the largest US companies, implemented a package of reforms designed to enhance the accuracy and reliability of corporate disclosures for publicly traded companies. These reforms included enhanced internal controls over financial reporting and significant whistleblower protections to encourage corporate insiders to report fraud. In a decision with significant implications for foreign companies with securities listed on a US stock exchange, a recent decision of the United States District Court for the Southern District of New York has, for the first time, held that under certain circumstances, the whistleblower protection provisions of SOX provide protection to employees located outside the United States[1].

Background

O'Mahony, an Irish citizen, was a partner and employee of Accenture LLP, the US subsidiary of the Bermuda-based Accenture Ltd. which is listed on the New York Stock Exchange. In September 1992, Accenture sent O'Mahony on an expatriate assignment to France to establish and head Accenture's new office in Sophia Antipolis. She remained in France as an employee of Accenture LLP for the next twelve years.

Under the terms of a 1987 treaty between the United States and France, a US employer that obtains a 'certificate of coverage' for an employee transferred to France may continue paying social security contributions for that employee in the United States instead of France for up to five years. However, after the first five years, the employer must begin paying French social security contributions which can amount to an additional one-third or more of an employee's total compensation.

Accenture obtained a certificate of coverage for the first five years of O'Mahony's employment in France, but thereafter failed to begin paying French social security contributions. O'Mahony alleged in her lawsuit that she complained internally to Accenture's global financial controller in New York, but was told that Accenture's global tax partner in California had decided that Accenture's 'interests' would be better served by not making any of the French social security contributions and continuing to affirmatively conceal from the French authorities the fact that O'Mahony had been working in France since 1992. O'Mahony alleged that, after informing Accenture she would not be a party to 'tax fraud', Accenture's Global Business Operations Director in New York retaliated against her by demoting her and substantially reducing her compensation.

Until the O'Mahony decision, most legal commentators believed that the decision of the United States Court of Appeals for the First Circuit in Carnero v Boston Scientific Corp., 433 F.3d 1 (1st Cir. 2006) precluded SOX whistleblower protection for any employee located outside the United States. The plaintiff in Carnero was an Argentinian citizen who worked for the Brazilian and Argentinian subsidiaries of the defendant, a United States company. The plaintiff alleged that he was fired by the subsidiaries in retaliation for complaining about accounting misconduct carried out by the foreign subsidiaries. The issue before the First Circuit, therefore, was 'whether the whistleblower provision of the [Sarbanes Oxley] Act has extraterritorial effect, so that a foreign employee . . . who complains of misconduct abroad by oversees subsidiaries may bring suit under the whistleblower provision of Sarbanes-Oxley against the listed United States parent company' (433 F.3d at 5). The First Circuit held that, because of the presumption against extraterritorial application of US statutes, SOX could not be applied to such an employee.

The Court's decision

Relying primarily on Carnero, both Accenture Ltd and Accenture LLP made motions to dismiss O'Mahony's claims on the basis that she was employed oversees. In denying the motion, Judge Marrero distinguished Carnero on three factual grounds and therefore determined that its holding was not applicable to O'Mahony's case. First, the plaintiff in Carnero was a foreign employee, employed and compensated exclusively by the Latin American subsidiaries of a United States corporation. By contrast, O'Mahony was employed and compensated by the United States subsidiary of a foreign company. Thus, Judge Marrero found that the Carnero court's concern over the United States interfering in the employment relationship between a foreign employer and its foreign employees was not implicated in O'Mahony's case.

Secondly, in Carnero, the alleged wrongful conduct that gave rise to the claim occurred outside the United States. Judge Marrero contrasted this with the allegations in the O'Mahony case that the conduct related to both the underlying fraud, and the retaliation against O'Mahony involved executives employed by the US Accenture partnership who were located within the United States. Finally, Judge Marrero

distinguished O'Mahony's claims, which were made directly against the United States subsidiary for the alleged misconduct of that subsidiary in the United States, from the claims in Carnero that, although made against the US parent company, were solely related to the alleged misconduct abroad by its Latin American subsidiary.

Having distinguished the Carnero decision, Judge Marrero proceeded to address the question of whether or not application of SOX in O'Mahony's case would nevertheless be precluded by the presumption against extraterritorial application of US laws. Applying the 'conduct test' developed by federal courts to determine whether application of a law to transactions beyond United States borders is permissible, Judge Marrero evaluated a number of factors in determining that SOX whistleblower protection could be afforded to O'Mahony. These factors included the following.

- The 'essential core' or 'center of gravity' of the wrongdoing. Here, O'Mahony alleged that both the conduct giving rise to the fraud and the retaliation against her for reporting the fraud occurred in the United States.
- The timeline of when and where the relevant domestic and foreign acts occurred. Here, the decision to reduce O'Mahony's level of responsibility occurred in very close proximity to her allegations of fraud against Accenture LLP, indicating that Accenture LLP may have been the 'driving force' behind the alleged retaliation against O'Mahony.
- The materiality and substantiality of the domestic conduct relative to the fraudulent transaction. Here, O'Mahony alleged that all the conduct giving rise to the fraud and the retaliation against her for reporting the fraud occurred in the United States by executives of Accenture LLP.
- Whether extending jurisdiction in the particular case is reasonable and in accordance with Congressional policy. Here, the Court emphasized that it was not being asked to intervene to apply American law in a dispute solely between foreigners concerning a foreign transaction.

Accordingly, Judge Marrero concluded that "under the facts in this case, the Court has subject matter jurisdiction over Accenture LLP because the alleged wrongful conduct and other material acts occurred in the United States by persons located in the United States, and hence the exercise of jurisdiction by this Court to resolve the dispute before it would not implicate extraterritorial application of American law."

Comment

In O'Mahony, both the underlying fraud and the retaliation against the whistleblower were perpetrated - or at least orchestrated - from within US borders. It remains to be seen whether other courts will extend the O'Mahony holding to cases in which only the retaliation, or only the underlying fraud, took place in the United States.

Most US employment statutes, by their own terms, limit their oversees protection to US citizens working abroad for US or US-controlled companies. However, there appears to be a greater justification for extending SOX whistleblower protection oversees, given that the US nexus in a SOX whistleblower case exists by virtue of a foreign company voluntarily listing its shares on a US stock exchange and thereby subjecting itself to a US regulatory regime that includes whistleblower protection. Congress's underlying rationale for providing whistleblower protection to US-listed companies was based on the assumption that prevention and detection of fraud at such companies will be enhanced if a company's employees are protected from retribution when they investigate or oppose such fraud. In the current era of corporate globalization, in which a significant percentage of the workforce of US-listed companies is based abroad, there would appear to be no justification for protecting a corporate whistleblower in New York while simultaneously permitting the same employer to retaliate against an employee in France for opposing precisely the same conduct.

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