Court Denies Extraterritorial Application of the Dodd-Frank Act's Whistleblowing Provisions

Insights
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On August 14, 2014, in *Liu Meng-Lin v. Siemens AG,* a three-judge panel of the United States Court of Appeals for the 2nd Circuit unanimously held that the whistleblowing provision of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Dodd-Frank Act"), does not protect a foreign worker employed abroad by a foreign corporation where all events related to the disclosures occurred abroad.(*Liu Meng-Lin v. Siemens AG,* 2d. Cir., Docket No. 13-4385, Decided August 14, 2014).

According to the Court's decision, the facts leading to this decision are as follows:Plaintiff-appellant Liu Meng-Lin ("Mr. Liu"), a citizen and resident of Taiwan, was employed as a compliance officer for the healthcare division of Siemens China, Ltd., a Chinese wholly-owned subsidiary of defendant-appellee Siemens AG ("Siemens"), a German corporation whose shares, at all relevant times, were listed on the New York Stock Exchange.Mr. Liu, according to his Complaint, discovered that Siemens employees were indirectly making improper payments to officials in North Korea and China in connection with the sale of medical equipment in those countries.Mr. Liu believed these payments violated both Siemens' policy and U.S. anti-corruption measures.He reported these allegations to his superiors through internal company procedures, including with a high-ranking Siemens executive in China.Mr. Liu claimed that as he sought to address these alleged violations, Siemens progressively restricted his authority as a compliance officer, demoted him and then ultimately fired him.

Two months after his discharge, Mr. Liu reported the alleged corrupt conduct to the U.S. Securities and Exchange Commission ("SEC"), claiming that Siemens had violated the U.S. Foreign Corrupt Practices Act ("FCPA").Mr. Liu then sued Siemens in the United States District Court for the Southern District of New York, alleging that Siemens retaliated against him in response to his disclosures of alleged corrupt conduct, thereby violating the whistleblower antiretaliation provision of the Dodd-Frank Act.The Dodd-Frank Act includes a provision prohibiting employers from retaliating against whistleblower employees who make certain protected disclosures.The provision in question states, in relevant part:

[n]o employer may discharge . . . or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any unlawful act done by the whistleblower . . . in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . ., this

chapter, . . . any other law, rule, or regulation subject to the jurisdiction of the [Securities and Exchange] Commission. (15 U.S.C. § 78u-6(h)(1)(A).

The District Court granted Siemens' motion to dismiss with prejudice, holding that the antiretaliation provision does not apply extraterritorially, and that, on the facts alleged by Mr. Liu, the Complaint sought an extraterritorial application of the statute.

In its August 14 decision, the 2nd Circuit stated that "to survive" Siemens' motion to dismiss, Mr. Liu had to demonstrate: 1) either that the facts alleged in his complaint stated a domestic application of the antiretaliation provision of the Dodd-Frank Act; or 2) the antiretaliation provision was is intended to apply extraterritorially.The Court first found that Mr. Liu, his employer and the other entities involved in the alleged wrongdoing were all "foreigners based abroad," and the whistleblowing, the alleged corrupt activity and retaliation also occurred abroad, and the Complaint revealed "essentially no contact with the United States regarding either the wrongdoing or the protected activity."

The Court rejected Mr. Liu's argument that Siemens' voluntary election to have a class of its securities publicly listed on the New York Stock Exchange meant that it had voluntarily subjected itself to United States securities laws.The Court stated that "where a plaintiff can point only to the fact that a defendant has listed securities on a U.S. exchange, and the complaint alleges no further meaningful relationship between the harm and those domestically listed securities, the listing of the securities alone" is the type of fleeting connection that cannot overcome the presumption against a statute's extraterritoriality (referring to *Morrison v. National Australian Bank, Ltd,* a 2010 United States Supreme Court case).

The 2nd Circuit also did not find the extraterritorial application of the statute, stating:

The support for the conclusion that the antiretaliation provision has no extraterritorial application is straightforward:there is absolutely nothing in the text of the provision . . . or in the legislative history of the Dodd-Frank Act, that suggests that Congress intended the antiretaliation provision to regulate the relationships between foreign employers and their foreign employees working outside the United States.Given the presumption against extraterritoriality, and the absence of any direct evidence of a congressional intent to apply the relevant provision extraterritorially, [Mr. Liu's] effort to cobble together indirect, circumstantial suggestions of extraterritorial application faces powerful headwinds.

The Court concluded that "[b]ecause a statute is presumed, in the absence of clear congressional intent to the contrary, to apply only domestically, and because there is no evidence that the antiretaliation provision is intended to have extraterritorial reach," the provision did not apply extraterritorially.The Court further stated that because Mr. Liu's complaint alleged that he was a non-citizen employed abroad by a foreign company, and that all events allegedly giving rise to liability occurred outside of the United States, "applying the antiretaliation provision to these facts would constitute an extraterritorial application of that statute."

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Of note is that the 2nd Circuit stated it need not determine:1) whether the District Court correctly ruled that Section 806 of the Sarbanes-Oxley Act, a provision that protects employees of publicly-traded companies who provide evidence of fraud, does not require or protect disclosures of FCPA violations; or 2) whether Mr. Liu's internal reporting of the alleged misconduct, with or without his subsequent disclosures to the SEC, qualified him as a whistleblower under the Dodd-Frank Act, and stated they expressed no views on those issues.Instead the Court restricted its holding to the following:since the whistleblowing antiretaliation provision of the Dodd-Frank Act does not apply extraterritorially, and Mr. Liu has failed to plead facts constituting a domestic application of the antiretaliation provision, the District Court correctly granted Siemens' motion to dismiss.

This case is helpful in addressing a situation that is alleged to have occurred totally outside of the United States, where the connection to the United States was the listing of stocks on the New York Stock Exchange.It is likely that in the future courts will be required to decide cases with different fact patterns that might include other types and levels of connections to the United States, and will provide further guidance on what connections might cause the Dodd-Frank Act's antiretaliation provisions to govern otherwise extraterritorial activities.