

Tab A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 04-10031-RWZ

RUBEN CARNERO

v.

BOSTON SCIENTIFIC CORP.

MEMORANDUM OF DECISION

August 27, 2004

ZOBEL, D.J.,

Plaintiff Ruben Carnero is an Argentinean citizen who worked for the Argentinean and Brazilian subsidiaries of defendant Boston Scientific Corporation, until he was terminated in 2002 allegedly after he reported accounting irregularities. Consequently, plaintiff initiated three actions: (1) a conciliation proceeding in Argentina seeking statutory severance; (2) an eight count Complaint against defendant, which this Court dismissed for lack of jurisdiction; and (3) an administrative complaint against defendant with the Department of Labor. The administrative complaint alleges retaliatory termination and other discrimination by defendant's Argentinean and Brazilian subsidiaries in violation of 18 U.S.C. § 1514A, which was enacted as part of the Corporate and Criminal Fraud Accountability Act of 2002, and incorporated as Title VIII of the Sarbanes-Oxley Act of 2002. On December 19, 2003, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration ("OSHA"), preliminarily determined that OSHA has no

jurisdiction to consider the merits of plaintiff's claim because nothing in the language of Section 1514A indicates any intention by Congress to cover employees working outside of the United States. (Pl.'s Decl. in Opp'n to Mot. to Dismiss, Tab 30). On January 7, 2004, plaintiff filed a Complaint in this Court seeking a de novo review of his administrative complaint and relief in the form of: reinstatement to his job, back pay, damages for loss of reputation, lost future wages, emotional distress and other economic injury.¹ Thereafter, on January 22, 2004, the Secretary issued a final decision dismissing the administrative complaint because of the pendency of the complaint in this Court. (Pl.'s Decl. in Opp'n to Mot. to Dismiss, Tab 31). Defendant Boston Scientific Corporation now moves to dismiss, or in the alternative, for summary judgment or stay.

Defendant asserts that Section 1514A does not apply to plaintiff, a foreign national who worked exclusively overseas. It is well established that Congressional legislation is meant to apply within the United States, absent any evidence of contrary intent. Smith v. United States, 507 U.S. 197, 204 (1993). This principle is based on a number of reasons, including "the commonsense notion that Congress generally legislates with domestic concerns in mind." Id. at n. 5. Thus, the language of the law is examined to determine whether there is "any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or some measure of legislative control." Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).

¹ Because the Secretary of Labor did not issue a final decision within 180 days of the filing of the administrative complaint, plaintiff filed suit in this Court pursuant to 18 U.S.C. § 1514A(b)(1)(B).

The scheme of the law is also considered as well as whether any distinction is drawn between alien employees and those who are citizens of the United States. Id. at 286. See, e.g., 29 U.S.C. § 623(f)(1)(stating that it is not unlawful for an employer to take action which is prohibited under the Age Discrimination in Employment Act of 1967, where the employee is in a foreign country and compliance with the statute would violate foreign law.). The absence of such distinction suggests that the law is to be applied only within the United States. Foley Bros., 336 U.S. at 286. Finally, the legislative history and the administrative interpretations of the law as it was developed may be taken into account. Id. at 287-288.

Title 18 U.S.C. § 1514A(a) provides that no company subject to the Securities Exchange Act of 1934 may retaliate against an “employee” who lawfully cooperates with an investigation concerning violations of the Act or fraud on the shareholders. Section 1514A(b), the enforcement provision, allows any “person” who alleges discharge or discrimination in violation of Section 1514A(a) to seek relief.

Nothing in Section 1514A(a) remotely suggests that Congress intended it to apply outside of the United States. No distinction is drawn between overseas employees and domestic employees. In fact, application of Section 1514A overseas may conflict with foreign laws, which is especially likely in this case where plaintiff seeks to be reinstated to his job. Notably, he has already invoked Argentinean law in support of his cause. He misunderstands the canon of construction when he asserts that neither the language nor the legislative history restricts the application of Section 1514A to domestic employees.

The protection of workers is a particularly local matter, and nothing in the legislative history supports plaintiff's assertion that the language of Section 1514A protecting an "employee" was meant to include all employees wherever they may work.

Finally, the parties do not point to any administrative interpretations of the law during its development phase. In any case, the preliminary determination by the Department of Labor coincides with this Court's reasoning.

Accordingly, defendant's motion to dismiss is allowed.

Judgment may be entered for the defendant.

DATE

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

Tab B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

A1

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U.S. DISTRICT COURT
DISTRICT OF MASS.
2003 SEP 15 P 4:56

RUBEN CARNERO

Plaintiff,

- v. -

BOSTON SCIENTIFIC CORPORATION

Defendant.

Civil Action No. 03-11479 (RWZ)

MOTION TO DISMISS OR STAY

Boston Scientific Corporation ("BSC") hereby moves this Court for an order dismissing this action or, in the alternative, staying this case pending the final resolution of a parallel, first-filed case that is proceeding in Argentina. Principles of international comity require this Court to dismiss or stay this action because Ruben Carnero's factual allegations have been raised in Argentina, where he initially invoked the judicial process to pursue his rights. Principles of judicial efficiency, the adequacy of judicial relief in Argentina, fairness to the parties and the fact that the Argentinean case was first-filed all require a dismissal or stay of this case. Alternatively, this action must be dismissed because (1) under the doctrine of *forum non conveniens*, Massachusetts is an inconvenient forum for this litigation and (2) Boston Scientific Argentina, S.A. would be an indispensable party to the Massachusetts Action that cannot be joined in the Massachusetts Action under Fed. R. Civ. P. 19 without destroying this Court's jurisdiction. In further support of this motion, BSC submits herewith its Memorandum in Support of Motion to Dismiss or Stay.

DOCKETED

The motion to dismiss is allowed because the facts on which plaintiff relies, establish only that he worked for several South American subsidiaries of defendant in South America and in that work had no contact with the defendant in Massachusetts, nor did this defendant in any way direct or control plaintiff. Judgment may be entered dismissing the complaint. (3) (Ryner Debel) 3/25/0

Tab C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RUBEN CARNERO,

Plaintiff,

-against-

BOSTON SCIENTIFIC CORPORATION,

Defendant.

Civil Action No. 03
11479 (RWZ)

**MOTION TO ALTER OR AMEND JUDGMENT
PURSUANT TO FED. R. CIV. P. 59(e) AND FOR
CONSOLIDATION PURSUANT TO FED. R. CIV. P. 42(a)**

Plaintiff Ruben Carnero hereby moves (i) pursuant to Fed. R. Civ. P. 59 (e) to Alter or Amend this Court's Endorsed Order dated March 25, 2004 granting defendant's motion to dismiss and the Judgment dismissing this lawsuit entered on March 25, 2004; and (ii) pursuant to Fed. R. Civ. P. 42(a) to consolidate for all purposes this lawsuit with the related lawsuit pending before this Court entitled *Carnero v. Boston Scientific Corporation*, 04-10031 (RWZ).

In support of this motion, plaintiff states the following:

Motion to Alter or Amend March 25, 2004 Order and Judgment

1. This Court's Endorsed Order dated March 25, 2004 states:

The motion to dismiss is allowed because the facts on which plaintiff relies, establish only that he worked for several South American subsidiaries of defendant in South America and in that work had no contact with the defendant in Massachusetts, nor did this defendant in any way direct or control plaintiff.

2. Plaintiff respectfully submits that the declarations plaintiff filed in

opposition to defendant's motion to dismiss establish that (i) he worked directly for

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Denial
Ryan Zabel, J.
5/13/04

Tab D

Record Evidence

The record before the district court consists of the following evidence:

1. *Evidence of Mr. Carnero's employment with BSC:*

- (i) the declaration of one of Mr. Carnero's supervisors, Juan Ziemke, executed in September 2003 (the "Ziemke Dec."), [A-25-41](#), and annexed exhibits A through L, [A-42-61](#);^{*}
- (ii) the declaration of Mr. Carnero executed on November 4, 2003 (the "Carnero Dec."), [A-179-194](#), and annexed exhibits 1 through 19, [A-221-284](#);^{*}
- (iii) the supplemental declaration of Mr. Carnero, executed on March 16, 2004 (the "Carnero Sup. Dec."), [A-175-178](#).

2. *Evidence of Argentine law and the parties' related litigation in Argentina:*

- (i) the declaration of BSC's Argentine lawyer, Carlos Dodds, executed on September 11, 2003 (the "Dodds Dec."), [A-62-68](#), and annexed exhibits A through F, [A-68](#);^{*}
- (ii) the declaration of Mr. Carnero's expert on Argentine law, Dr. Mario Ackerman, executed on November 4, 2003 (the "Ackerman Dec."), [A-198-220](#), and annexed exhibits 25 through 28, [A-302-312](#);^{**}
- (iii) a supplemental declaration of Mr. Dodds executed on December 5, 2003 (the "Dodds Sup. Dec."), [A-69-73](#), and annexed exhibits 1 through 8, [A-74](#);^{*}
- (iv) another declaration of Mr. Dodds, executed on April 12, 2004 (the "Dodds 2d Sup. Dec."), [A-398-399](#), and annexed exhibits A through E, [A-400](#).^{*}

^{*}Untranslated exhibits have not been reproduced in the Appendix pursuant to L. R. 30(d).

^{**}Exhibits to declarations submitted on behalf of Mr. Carnero are numbered consecutively with exhibits to previously submitted declarations. An index to the exhibits submitted by Mr. Carnero, which include all of the exhibits submitted by BSC that were either written in, or translated into, English, is set forth at [A168-170](#), and is annexed hereto.

3. *Evidence of the procedural history of the parties' claims:*
- (i) the declaration of Mr. Carnero's counsel, Silvia Bolatti, executed on November 4, 2003 (the "Bolatti Dec."), [A-194-197](#), and annexed exhibits 20 through 24, [A-285-301](#);
 - (ii) the declaration of BSC's counsel, Leslie Blickenstaff, executed on January 27, 2004 (the "Blickenstaff Dec."), [A-75-77](#), and annexed exhibits 1 through 8, [A-78-166](#); and
 - (iii) the declaration of Mr. Carnero's counsel, Edward Griffith, executed on March 16, 2004 (the "Griffith Dec."), [A-171-174](#), and annexed exhibits 29 through 34, [A-313-327](#).

Index to Plaintiff's Exhibits

<u><i>Exhibit No.</i></u>	<u><i>Document</i></u>	<u><i>Record Page No.</i></u>
1	BSC Stock Option Plan prepared for Carnero	A-221
2	BSC letters dated between May 1997 and December 2001 awarding stock options to Carnero	A-227
3	Offer letter dated January 31, 1997 to Carnero (on BSC stationary)	A-42
4	Employment agreement between Carnero and BSC's Argentine subsidiary (original in English)	A-45
5	BSC Code of Conduct	A-242
6	BSC's June 25, 2001 letter to Carnero regarding job assignment in Brazil (original in English)	A-52
7	BSC's June 25, 2001 Interoffice Memorandum to Carnero regarding job assignment in Brazil (original in English)	A-54
8	Employment agreement between Carnero and BSC's Brazilian subsidiary (in Portugese)	not included (L.R. 30(d))
9	BSC's August 9, 2002 Interregion Memo announcing Carnero's departure	A-262
10	Complaint in Carnero's related State Law Action	A-336
11	Complaint in Carnero's Federal Whistleblower Action before the United States Department of Labor	A-7
12	December 31, 1996 memorandum from BSC to Carnero proposing compensation package	A-264
13	BSC business cards for Ruben Carnero	A-265
14	December 1, 2000 letter from BSC's General Manager for Latin America to the Brazilian Labor Ministry	A-268

<u><i>Exhibit No.</i></u>	<u><i>Document</i></u>	<u><i>Record Page No.</i></u>
15	August 8, 2002 letter terminating Carnero (original in English and Portugese)	A-270
16	March 19, 2003 telegram from Carnero to BSC's Argentine subsidiary (English translation followed by Spanish original)	A-272
17	March 25, 2003 telegram from BSC's Argentine subsidiary to Carnero (English translation followed by Spanish original)	A-274
18	April 3, 2003 telegram from BSC's Argentine subsidiary terminating Carnero (English translation followed by Spanish original)	A-276
19	Closing report of mediator in Carnero's Argentine Conciliation Proceeding (English translation followed by Spanish original)	A-279
20	May 9, 2003 demand letter to BSC from Carnero's US counsel	A-285
21	May 22, 2003 letter from BSC's Argentine counsel to Carnero's US counsel	A-294
22	June 9, 2003 letter from Carnero's US counsel to BSC's Argentine counsel	A-295
23	June 20, 2003 letter from BSC's Argentine counsel to Carnero's US counsel	A-297
24	June 27, 2003 letter from BSC's Argentine counsel to Carnero's US counsel followed by English translation of BSC's Argentine defamation complaint followed by original Spanish version	A-300
25	Resume of plaintiff's expert on Argentine law, Dr. Mario Ackerman	A-302
26	List of documents reviewed by plaintiff's expert in Argentine law, Dr. Mario Ackerman	A-306

<u><i>Exhibit No.</i></u>	<u><i>Document</i></u>	<u><i>Record Page No.</i></u>
27	June 19, 2003 recommendation of the Prosecutor in BSC’s Argentine defamation lawsuit recommending that Argentine court deny BSC’s motion for a TRO (English translation followed by Spanish original)	A-307
28	June 23, 2003 decision of Argentine court adopting the Prosecutor’s June 19, 2003 recommendation and denying BSC’s motion for a TRO (English translation followed by Spanish original)	A-311
29	The complaint filed in this lawsuit (without exhibits)	A-4
30	The December 19, 2003 preliminary decision by the Department of Labor in Carnero’s administrative proceeding	A-314
31	The January 22, 2003 final decision of the Department of Labor issued in Carnero’s administrative proceeding	A-316
32	A reprint of the statement of Senator Leahy from Vermont regarding the whistleblower provision of the Sarbanes-Oxley Act that appears at 149 Cong. Rec. S1725-01	A-155
33	Te Department of Labor’s administrative decision in <i>Stone v. Duke Energy</i> , Case No. 2003-SOX-00012	A-320
34	Plaintiff’s Local Rule 56.1 Statement of Material Facts as to which there exists a Genuine Issue	A-323