

June 30, 2008

First Sentencing for Violation of the Economic Espionage Act of 1996

Last week a software engineer in Cupertino became the first person to be sentenced under the Economic Espionage Act enacted by Congress in 1996 (EEA). In a federal court in San Jose, Xiaodong Sheldon Meng pled guilty to two counts: one for violating the EEA and one for violating the Arms Export Control Act (AECA). He was sentenced to prison for 24 months. The EEA provides for a maximum sentence of 15 years.

Upon leaving his former employer, Quantum 3D of San Jose, Meng failed to erase some source code from his computer which contained trade secrets, including software used for training fighter plane pilots. Meng then used some of that software in a demonstration to Chinese naval personnel.

Meng admitted he (1) *attempted* to sell fighter pilot training software to the Chinese Navy, (2) misappropriated trade secrets from Quantum 3D with the intent to benefit a foreign government, and (3) knowingly and willfully exported to China software described on the U.S. government's Munitions List.

OVERVIEW OF THE ECONOMIC ESPIONAGE ACT

The **EEA** applies to acts committed both within and outside the United States, and contains two provisions: one addresses economic espionage directed by foreign governments (18 U.S.C. §1831), while the other prohibits the commercial theft of trade secrets carried out for economic or commercial advantage (18 U.S.C. §1832).

Under section 1831, the government must prove that the defendant stole, obtained without authorization, destroyed, or conveyed information the defendant knew was a trade secret and would benefit a foreign government.

Under section 1832, the government must prove beyond a reasonable doubt that: (1) the defendant stole, obtained without authorization, sent, destroyed, or conveyed information he knew was a trade secret; (2) the defendant intended to convert the trade secret to the economic benefit of someone other than its owner; (3) he knew that the owner of the trade secret would be injured; and (4) the trade secret was related to a product that involved interstate or foreign commerce. There is no "benefit a foreign government" requirement, as with section 1831.

The **AECA** generally covers disclosures to foreign nationals located within the United States, regardless of whether the restricted information or product is actually transmitted overseas. The AECA also could apply to information e-mailed to an individual overseas or to a foreign national within the United States.

WHY THIS IS IMPORTANT

There is a common perception that someone who misappropriates trade secrets is subject to claims and liability under state civil and criminal laws only. As the Meng case demonstrates, such misappropriation also may be subject to federal criminal laws.

It is significant that the EEA's scope includes *attempts* to engage in specified behavior, regardless of whether the behavior is successful. By comparison, a civil action for trade secret misappropriation generally is actionable only if the defendant actually engages in specified behavior *and* the plaintiff suffers actual damage or faces a risk of imminent harm.

THE BOTTOM LINE

1. Despite its name, the EEA's coverage is *not* limited to activities involving foreign espionage.
2. An employee leaving a job should be extremely careful not to walk away with any confidential information

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belonging to the former employer.

3. Even the attempt to disclose certain trade secrets may expose employees to federal criminal prosecution and prison time.

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