U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

LI TAO HU,

COMPLAINANT,

v.

PTC, INC.,

RESPONDENT.

ARB CASE NO. 2017-0068

ALJ CASE NO. 2017-SOX-00019

DATE: **September 18, 2019**

Appearances:

***For the Complainant*:**
Li Tao Hu,[1] Pro se, Shanghai, China

***For the Respondent*:**
David S. Rubin, Esq.; Joseph T. Toomey, Esq.; *Nutter McClennen & Fish, LLP*, Boston, Massachusetts

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Thomas H. Burrell, *Administrative Appeals Judges.*

[1] We note that Complainant refers to himself as "Hu Li Tao" in his complaint and all other submissions to the Board while the Decision and Order below refers to him as "Li Tao Hu." We presume that naming conventions differ in China and that Complainant's "last name" or "family name" is "Hu" and that it would be placed first rather then last in Chinese usage. In the interest of consistency we will not revise Complainant's file name. We acknowledge the inconsistency and will refer to him as "Hu."

FINAL DECISION AND ORDER

THOMAS H. BURRELL, ADMINISTRATIVE APPEALS JUDGE. This case arises under the whistleblower provision of the Sarbanes-Oxley Act of 2002 (Section 806 or SOX), 18 U.S.C. § 1514A (2010), as amended, and its implementing regulations at 29 C.F.R. Part 1980 (2016). At the time in question, Hu Li Tao was an employee of PTC, China, a foreign subsidiary of PTC, Inc., a U.S. company (hereinafter PTC, USA). Hu filed a complaint alleging that his suspension and termination violated the whistleblower provisions of Section 806. PTC, USA, filed a motion for summary decision in which it argued that Section 806 does not apply extraterritorially. The Administrative Law Judge (ALJ) granted the motion, and we now affirm that decision.

BACKGROUND[2]

Complainant Hu Li Tao was an employee of PTC, China, which is a subsidiary of PTC, USA. PTC, USA is headquartered in Needham, Massachusetts, and is registered under Section 12 of the Securities and Exchange Act of 1934, 15 U.S.C. 78*l*.

It is undisputed that Hu worked entirely in China. Hu asserts that although he worked for and was paid by PTC, China, he was a sales employee who received sales quotas and signed a sales-incentive plan directly from PTC, USA, through a global internet sales platform. Hu claims that he was substantially supervised by PTC, USA, and that PTC, USA, controls PTC, China's decisions, including hiring and termination decisions. Decision and Order (D. & O.) at 3; Hu Br. at 5-6.

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[2] We restate facts taken from the ALJ's Decision and Order or the parties' allegations where indicated. We make no independent findings of fact on appeal. We note that the filings and evidence before the ARB and the ALJ contain documents in a foreign language. The ALJ did not have these documents translated. While not always required, given Hu's self-represented status and our uncertainty as to his translation resources in China, we suggest for future reference that ALJs consider the use of translation services available to federal agencies. https://www.oalj.dol.gov/ TRANSLATION_AND_ INTERPRETATION.HTM. In this case, however, we are able to affirm the ALJ's decision on the undisputed facts.

Hu avers that he was ordered by his managers to book false orders including future sales orders.[3] According to Hu, PTC, USA, derived illegal income and profits from these transactions in violation of U.S. securities laws. D. & O. at 4; Hu Br. at 11-12. Hu claims that he reported his concerns about these transactions to his managers but was told not to worry. According to Hu, some of the alleged misconduct occurred outside of China. D. & O. at 4. According to PTC, USA, all of the alleged misconduct took place in China. D. & O. at 1.

Hu claims that on or about July 14, 2016, he was told to resign and collect a severance package or be placed on a performance-improvement plan. On or about August 4, 2016, Hu was placed on a performance-improvement plan by PTC, China. Hu Br. at 3. On that same day, August 4, 2016, Hu filed an internal report via an online complaint portal pursuant to internal ethics guidelines. Hu alleged that PTC, USA, engaged in misconduct and falsification of records. D. & O. at 4. On August 5, 2016, Hu was called into a meeting to discuss the report.[4]

Yvonne Zhang, Legal Manager, and Anthony Yan, Human Resources Director, both employees of PTC, China, suspended Hu on September 6, 2016. D. & O. at 4. According to Hu, Jerry Luo, Compliance Manager of PTC, China, told him that PTC, USA, had made the decision. Hu also claims that the Vice President of PTC, China, fired him on November 1, 2016, and that he was told again that the decision was made by PTC, USA. Hu Br. at 4, 6-7.

Hu filed a SOX complaint with the Occupational Safety and Health Administration (OSHA) on or about January 5, 2017. OSHA dismissed the case on January 20, 2017, for lack of jurisdiction. Hu filed objections on or about February 15, 2017, with the Office of Administrative Law Judges.

Before the assigned ALJ, PTC, USA, filed a request to dismiss the complaint on the grounds that SOX does not apply to employees working outside of the United States, citing *Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247 (2010). In response, the ALJ issued a show cause order asking the parties why the case should not be dismissed. Hu responded to the Order.

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[3] Hu Br. at 3. The record does not include an allegation of the number or dates of the orders or why they were false.

[4] Jerry Luo, Compliance Manager, and Yvonne Zhang, Legal Manager, both of PTC, China, attended the meeting. An attorney for PTC, USA, attended the meeting by phone.

On August 2, 2017, the ALJ granted PTC, USA's motion for summary decision. The ALJ noted that the uncontroverted evidence of record was that Hu was a Shanghai-based employee of a Chinese subsidiary of PTC, USA, and worked entirely in China. Hu was not hired in the U.S., and the ALJ reasoned that although decision-makers in the U.S. might have orchestrated his termination, this fact did not confer jurisdiction or authorize application of Section 806 of SOX to Hu's case. D. & O. at 6. Hu appealed the ALJ's decision to the Administrative Review Board (ARB or Board).

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's decision under Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019); 29 C.F.R. Part 1980. The ARB reviews an ALJ's grant of summary decision de novo. *Siemaszko v. First Energy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, at 3 (ARB Feb. 29, 2012). Under 29 C.F.R. § 18.72, an ALJ may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that based on the law a party is entitled to summary decision.

To avoid summary decision, the non-moving party must rebut the motion and evidence presented by the moving party with contrary evidence sufficient to create a genuine issue of material fact. That rebuttal, or answer, "may not rest upon mere allegations or denials in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Siemaszko*, ARB No. 09-123, at 3. In assessing this, or any, summary decision, both the ARB and the ALJ must view the evidence, along with all reasonable inferences, in the light most favorable to the non-moving party.

DISCUSSION

Section 806's employee-protection provision generally prohibits covered employers and individuals from retaliating against employees because they provide

information or assist in investigations related to the categories listed in the SOX whistleblower statute.[5]

To state a claim under Section 806, a complainant must allege that he engaged in protected activity, the employer took an unfavorable action against him, and that the protected activity was a contributing factor in the adverse action. *See*

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[5] Section 806 states the following:

> (a) *Whistleblower Protection For Employees Of Publicly Traded Companies.*—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 79c), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
>
> > (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
> >
> > > (A) a Federal regulatory or law enforcement agency;
> > > (B) any Member of Congress or any committee of Congress; or
> > > (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
> >
> > (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514(a).

Prioleau v. Sikorsky Aircraft Corp., ARB No. 10-060, ALJ No. 2010-SOX-003, at 5 (ARB Nov. 9, 2011). Under 18 U.S.C. § 1514A(b)(2)(C), SOX complaints are decided using the legal burdens of proof set forth in the employee-protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), 49 U.S.C. § 42121.

It is undisputed that Hu is a foreign citizen who worked for PTC, China, during all relevant periods. It is likewise undisputed that PTC, China, is a foreign subsidiary of PTC, USA, a U.S. company registered under Section 12 of the Securities Exchange Act of 1934. Hu alleges that he reported misconduct to both his direct employer and to PTC, USA, and that the wrongdoing he reported affected the U.S. company financials and the U.S. markets. He further alleges that he was suspended and terminated by PTC, China, on instructions from PTC, USA.

The sole issue before the ALJ and before the ARB on appeal is whether Section 806 reaches, or covers, Hu's complaint alleging a retaliatory discharge in China. The ALJ granted Respondent's motion for summary decision based on the legal argument that the statute does not reach acts committed outside the United States. As we noted previously, the ALJ noted that the evidence was uncontroverted that Hu was not hired and never worked in the United States. Although decision-makers in the U.S. might have orchestrated his termination, this fact does not confer jurisdiction or permit adjudication of Hu's case under Section 806. D. & O. at 6.

The Supreme Court has ruled on a similar question in a case arising out of securities law rather than an anti-retaliation statute like Section 806. In *Morrison v. Nat'l Australia Bank, Ltd.*,[6] the Court announced a two-step framework for analyzing extraterritoriality.[7] In step one of its two-part test, the Supreme Court considered whether the statute at issue reaches extraterritorially beyond the U.S.

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[6] In *Morrison,* Australian investors had filed claims in a United States federal court pursuant to Section 10(b) of the Securities Exchange Act of 1934, alleging, among other things, that the defendant Australian bank committed securities fraud.

[7] 561 U.S. 247 (2010). Before *Morrison*, courts applied the "conducts and effects" test. Under the Second Circuit's "conducts and effects" test, a court has jurisdiction when there is substantial conduct in the United States or the alleged violation had substantial effects in the United States. *SEC v. Berger*, 322 F.3d 187, 192-93 (2d Cir. 2003). *Morrison* rejected the conducts and effects test.

The Court in *Morrison* applied a fundamental presumption that, in the absence of evidence to the contrary, Congress intends its legislation to apply domestically and not outside the U.S. The Court concluded that the text of the statute at issue did not provide for extraterritorial reach and the presumption against extraterritoriality had not been rebutted when looking beyond the text. *Morrison*, 561 U.S. at 265.

If a statute is not extraterritorial, the *Morrison* analysis continues with a second step. In step two, the Court examines the essential or primary focus of a statute and where the activity comprising that focus occurred. If that activity occurred within the United States, a statute's lack of extraterritorial reach is not relevant. The *Morrison* Court concluded that the essential focus of the claim at issue was manipulation or deception in connection with the sale or purchase of securities. Plaintiffs' transactions had occurred extraterritorially and beyond the domestic reach of the statute. *Morrison*, 561 U.S. at 273. Having failed both *Morrison* steps, the Court concluded that plaintiffs' claims failed to state a cause of action upon which the U.S. courts were able to grant relief.

Applying *Morrison* to Hu's claim, we confront the explicit language of the Supreme Court in *Morrison* noting a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" 561 U.S. at 255 (quoting *EEOC v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991)). "This principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate." *Id.* "It rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." *Id.*

Whether a statute has extraterritorial reach turns on the statutory text, the relevant statutory context, and the legislative intent. "'[U]nless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'" *Id*. (quoting *Aramco,* 499 U.S. at 248). The conduct or effect in any particular case does not alter a statute's extraterritorial reach.

As we held before and reaffirm now after *Morrison*, Section 806 is not extraterritorial in its reach.[8] The text and legislative history of Section 806 does not contain a clear, affirmative indication that Congress intended extraterritorial application. Finding no indication of extraterritoriality, we hold that Section 806 is not extraterritorial.[9] The facts in this case line up with those in *Carnero v. Boston Sci. Corp.*, 433 F.3d 1 (1st Cir. 2006). Carnero was an Argentine citizen who was employed and terminated by a foreign subsidiary of a U.S. parent company and who also alleged a violation of Section 806. The Court of Appeals for the First Circuit

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[8] Before *Morrison*, the ARB had held that Section 806 does not apply extraterritorially. *Ede v. The Swatch Group Ltd.*, ARB No. 05-053, ALJ Nos. 2004-SOX-068, -069 (ARB June 27, 2007); *Salian v. Reedhycalog UK*, ARB No. 07-080, ALJ No. 2007-SOX-020 (ARB Dec. 31, 2008); *Ahluwalia v. ABB, Inc.*, ARB No. 08-008, ALJ No. 2007-SOX-044 (ARB June 30, 2009).

[9] The Board has also grappled with this question after the ALJ's decision in *Hu*. In a divided opinion in which each of the three panel members issued a separate opinion, the Board evaluated different approaches to the extraterritorial reach of SOX generally and Section 806 in particular. *See Blanchard v. Exelis Sys. Corp.,* ARB No. 15-031, ALJ No. 2014-SOX-020 (ARB Aug. 29, 2017). Two members of the panel affirmatively held that Section 806 had extraterritorial reach as a matter of statutory construction. However, two of the panel members also held that Blanchard's appeal could and should be resolved as a domestic application of Section 806 rather than as an extraterritorial matter. Whether viewed as an essential holding or as *dicta*, *Blanchard*'s discussion of extraterritoriality failed to appreciate the significance of *Morrison* and the absence of any action by Congress after *Morrison* to give Section 806 a clear reach beyond the domestic jurisdiction of the United States. Likewise, *Blanchard*'s reliance upon *RJR Nabisco v. European Community*, 136 S. Ct. 2090 (2016), is misplaced. The Court in *RJR Nabisco* held that the federal RICO statute could be applied extraterritorially in those cases in which the predicate offense statutes applied extraterritorially. 136 S. Ct. at 2102. The Board in *Blanchard* overlooked both the deep skepticism expressed by the Court in *RJR Nabisco* toward private foreign injury claims absent "clear direction from Congress," *id.* at 2107, and the fact that Section 806 is just such a private cause of action: a whistleblower protection law wherein a successful complainant need only show a reasonable belief of a violation of one of the six categories of protected activity and retaliation because of that protected activity. As we now hold, Congress did not provide a clear indication of extraterritorial reach or address the concerns raised by applying Section 806 to foreign employment settings.

We agree, however, that the *Blanchard* case is properly understood as a domestic application of the law. We quote with approval, the concurring opinion of Chief Judge Igasaki in *Blanchard*:

> Because I believe that this case is a domestic one, involving a U.S. Corporation with securities listed on a U.S. exchange, contracting with the U.S. military on a U.S. base that is [a] U.S. territory for purposes of the law and facts of this case, and employing a U.S. citizen employee contesting the application of U.S. rules and actions taken against him by managers in the U.S. or acting on their decisions, I do not agree that it presents an opportunity to define the general extraterritoriality of §806, or, as the ALJ has done, rule against Complainant because the matter is extraterritorial.

Blanchard, slip op. at 21.

held that Carnero's complaint "faces a high and we think insurmountable hurdle in the well-established presumption against the extraterritorial application of Congressional statutes." *Id.* at 7. The court observed that "[w]here, as here, a statute is silent as to its territorial reach, and no contrary congressional intent clearly appears, there is generally a presumption against its extraterritorial application." *Id.* "Not only is the text of 18 U.S.C. § 1514A silent as to any intent to apply it abroad, the statute's legislative history indicates that Congress gave no consideration to either the possibility or the problems of overseas application." *Id.* at 8. We concur with this analysis.[10] There is no clear indication in the text or legislative history that Congress intended for Section 806 to apply extraterritorially. *Morrison*, 561 U.S. at 255 ("[w]hen a statute gives no clear indication of an extraterritorial application, it has none").

Our conclusion on this point is significantly bolstered by the fact that Congress amended Section 806 in 2010 following *Morrison* but did not provide for extraterritorial reach as part of that amendment. Congress enacted Section 929A of the Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376, 1852 (2010), to clarify that Section 806(a) of SOX applies to "any subsidiary or affiliate whose financial information is included in the consolidated financial statements" of an otherwise covered company. In the same legislation, Congress expressly provided for the extraterritorial application of an enforcement action brought by the Securities and Exchange Commission (SEC). This was to address the impact of *Morrison* on extraterritorial enforcement of securities laws.[11] Congress was obviously aware of *Morrison* and enacted clear, affirmative text rebutting the presumption against extraterritoriality.

Congress did not add similar language in the amendments to Section 806. It is a commonplace of statutory interpretation that where Congress "includes

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[10] We consider it to be significant that *Carnero* was issued in 2006, before *Morrison* (which was issued in 2010), and that it considered precisely the provision of SOX which is before us. In the time since 2006, neither the Supreme Court nor Congress have disturbed the specific holding of *Carnero* that Section 806 is domestic and not extraterritorial in its reach.

[11] Section 929P of the Dodd-Frank Act, 124 Stat. 1864-1865, expands the scope of federal courts' jurisdiction over actions or proceedings brought or instituted by the Securities Exchange Commission or the United States alleging a violation involving conduct within the United States in furtherance of a violation and conduct occurring outside the United States that has a foreseeable substantial effect within the United States. 124 Stat. 1864-1865 (referring to authority of SEC and United States to bring actions in federal courts under specified statutes).

particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). However we need not rely only on general rules of interpretation where the Supreme Court has clearly stated that statutes without some obvious indication of extraterritorial reach should be regarded as territorial. Likewise, where *Carnero* holds that Section 806 is domestic in its reach and stands uncontradicted and unmodified on that point, the question of extraterritorial application of that section is not close. Finally, when, as noted above, Congress has declined to amend Section 806 in almost a decade since *Morrison*, we find it beyond cavil that Section 806 is domestic in it application.

Applying the second step of the *Morrison* analysis, as we must, we next conclude that the primary focus of Section 806 is on the retaliatory adverse personnel action. While Sarbanes-Oxley's overarching purpose may be to protect the markets from fraud, that meta-purpose is not dispositive of the question before us. Rather, we look to the text of the statute at issue and the primary focus of Section 806 itself.[12] Section 806 provides that "[n]o [covered] company . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of [the employee's protected activity]." 18 U.S.C. § 1514A(a). For the specific application of *Morrison*, the primary focus of Section 806 is necessarily connected to the employee's terms and conditions of employment. This focus helps to explain why Section 806 is administered by the U.S. Department of Labor and not by the SEC.

Because we conclude that the primary focus of Section 806 is necessarily linked to deterring and punishing retaliation against an employee's terms, conditions, and privileges of employment, the location of the employee's permanent or principal worksite is the key factor to consider when deciding whether a claim is a domestic or extraterritorial application of Section 806.[13] The focus is the employee

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[12] In *Blanchard*, the ARB, examining *Villanueva v. Core Laboratories, NV,* ARB No. 09-108, ALJ No. 2009-SOX-006 (ARB Dec. 22, 2011), held that the primary focus of Section 806 was preventing fraud and protecting the financial markets. We conclude this is error because it fails to account for Section 806's specific statutory text and conflates the primary focus of Section 806 with other aspects and goals of Sarbanes-Oxley as a whole.

[13] The determination of "principal worksite" or "permanent worksite" is dependent upon the evidence in individual cases and we decline the task of establishing a general definition in this opinion. The case before us can be resolved without reaching this issue.

and the controlling authority is labor and employment law rather than securities law. Accordingly, the location of other conduct, which may be the subject of other requirements, regulation or prohibitions under SOX, becomes less critical, if not irrelevant. In perhaps a majority of extraterritorial complaints under section 806 there is some tangential connection to the United States. *Morrison*, 561 U.S. at 266 ("[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.…"). But a Section 806 complaint concerning an adverse action which affected an employee at a principal worksite abroad does not become territorial because the alleged misconduct occurred in the U.S., or because it had, or would have, effects on U.S. securities markets, or because the alleged retaliatory decision was made in the United States.

Applying the above reasoning to Hu's Section 806 complaint, we conclude that it is not a domestic application of Section 806. At the time in question, Hu was a foreign citizen working for a foreign subsidiary of a publicly traded U.S. company. It is undisputed that Hu's principal place of work was in China and not the United States.[14] The only domestic contacts are that the termination decision may have been made directly or indirectly in the U.S. and that the U.S. markets were, or would be, affected by the conduct identified in Hu's allegations. These facts do not, in and of themselves, create a domestic application of Section 806.

CONCLUSION

We conclude that Section 806 is not extraterritorial in application and the primary focus of Section 806 is on the retaliatory action as it affects the employee's terms, conditions, and privileges of employment.

Applying these conclusions to Hu's claim, we **AFFIRM** the ALJ's decision as correct in fact and law. Accordingly, the complaint is hereby **DISMISSED**.

SO ORDERED.

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[14] The question of whether Hu's principal place of employment placed his complaints within the domestic jurisdiction of SOX is easily answered in this case because Hu has never worked in the United States. More difficult fact patterns will arise but we consider the principal or primary worksite of the Complainant to be the factor which will guide the analysis of whether a claim is within the jurisdiction of section 806 of SOX, or is extraterritorial and outside that jurisdiction.