



In the Matter of:

CHRISTOPHER GARVEY,

ARB CASE NO. 2020-0034

COMPLAINANT,

ALJ CASE NO. 2017-SOX-00030

v.

DATE: July 16, 2021

MORGAN STANLEY,

RESPONDENT.

**Appearances:**

*For the Complainant:*

Christopher Garvey; *pro se*; Madrid, Spain

*For the Respondent:*

A. Klair Fitzpatrick, Esq. and Sarah E. Bouchard, Esq.; *Morgan, Lewis & Bockius, LLP*; Philadelphia, Pennsylvania

Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek,  
*Administrative Appeals Judges*

## DECISION AND ORDER

PER CURIAM. 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 (2020). During the relevant time period, Christopher Garvey (Complainant) was an employee of Morgan Stanley Asia Limited, a foreign subsidiary of Morgan Stanley (Respondent), a publicly traded U.S. company. Complainant filed a complaint alleging his employer took adverse actions against him in violation of the whistleblower provisions of Section 806 because he made SOX-protected reports. Respondent filed a motion for dispositive action in which it argued that the complaint presents an

impermissible extraterritorial application of Section 806. An Administrative Law Judge (ALJ) issued an Order Dismissing Complaint. The ALJ concluded that because Section 806 does not apply to extraterritorial activity, the statute required the claim to be dismissed. We affirm.

### **BACKGROUND**

Complainant, a U.S. citizen, was an employee of Morgan Stanley's foreign subsidiaries from 2006 to 2016. Respondent is headquartered in New York City. In 2006, Complainant was hired by Morgan Stanley Japan Group and worked in Tokyo. Following the 2011 tsunami in Japan, Complainant worked remotely until his employment was officially transferred to Morgan Stanley Asia Limited. Complainant worked and lived in Hong Kong until his resignation in 2016.

In December of 2014, Complainant raised allegations that Respondent was involved with market manipulation, insider trading, and U.S. tax fraud. Respondent began an investigation into these allegations and in December of 2015, Complainant traveled to New York City to assist with the investigation. Sometime after the investigation began, Complainant raised further allegations involving a potential cover-up of his previously voiced allegations. Complainant contends that a few weeks later his compensation was reduced and he was encouraged to look for a new job with a different employer. On February 5, 2016, Complainant resigned from his position with Morgan Stanley Asia Limited.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the Board the authority to review ALJ decisions under SOX.<sup>1</sup> The ARB reviews an ALJ's order on motions to dismiss *de novo*.<sup>2</sup> In considering a motion to dismiss, both the ARB and the ALJ must view

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<sup>1</sup> Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

<sup>2</sup> *Johnson v. The Wellpoint Cos., Inc.*, ARB No. 2011-0035, ALJ No. 2010-SOX-00028 (ARB Feb. 25, 2013).

the evidence, along with all reasonable inferences, in the light most favorable to the non-moving party.<sup>3</sup>

## 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. To prevail on a claim under Section 806, a complainant must prove by a preponderance of the evidence that: (1) he engaged in activity that SOX protects; (2) the respondent took unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the adverse personnel action.<sup>4</sup> An employer may avoid liability if it proves, by clear and convincing evidence that it would have taken the adverse action in the absence of protected activity.

This case asks whether SOX's protection reaches an employee working in Asia. The two-step framework in *Morrison v. Nat'l Australia Bank, Ltd.* requires analysis of: (1) whether the statute at issue extends extraterritorially and, if not, (2) whether the activity comprising the focus of the SOX protection occurred within the United States or outside of it. If the activity occurred within the U.S., then there is a permissible domestic application of the statute. However, if the activity occurred outside the U.S., then there is an impermissible extraterritorial application (again, where the relevant statute does not provide for such application) and the complaint must be dismissed.<sup>5</sup>

The Board has recently held, building on the findings in *Morrison*, that

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<sup>3</sup> *Tyndall v. U.S. EPA*, ARB No. 1996-0195, ALJ Nos. 1993-CAA-00006, 1995-CAA-00005, slip op. at 2 (ARB June 14, 1996).

<sup>4</sup> 29 C.F.R. § 1980.109(a); see also 18 U.S.C. § 1514A(b)(2)(A) (citing 49 U.S.C. § 42121(b)). 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.

<sup>5</sup> *Hu v. PTC, Inc.*, ARB No. 2017-0068, ALJ No. 2017-SOX-00019, slip op. at 6, 10 (ARB Sept. 18, 2019); *Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247, 266-70 (2010).

Section 806 does not have extraterritorial application.<sup>6</sup> Therefore, to allow the adjudication of the complaint before us, it must be a domestic application of Section 806. The Board has held that “the location of the employee’s permanent or principal worksite is the key factor to for us to consider.”<sup>7</sup>

Applying this analytical framework to the Section 806 complaint in this case, we conclude that the claim does not represent a domestic application of Section 806. It is undisputed that Complainant’s principal place of employment during the relevant time period was in Hong Kong.<sup>8</sup> Nonetheless, Complainant argues there are sufficient, tangible domestic contacts in his case that are distinguishable from the holdings in *Hu* and *Perez*, which allow for a domestic application of Section 806. For example, Complainant argues that his daily interactions included communicating to supervisors and colleagues located in New York City, that he had a business trip to the U.S. during his employment to assist in the investigation into his allegations, and that he accused Respondent of violating U.S. laws affecting current U.S. investors and shareholders. However, focusing on the principal place of employment, the Board has recently held that “the location of other conduct, which may be the subject of other requirements, regulation or prohibitions under SOX, becomes less critical, if not irrelevant.”<sup>9</sup> Hence, we conclude Complainant’s argument that his domestic contacts during his employment with Morgan Stanley Asia Limited created a domestic application of Section 806 misses the mark.

Complainant also alleges that Respondent retaliated against him in the U.S. after his resignation. Complainant contends he hired a D.C. based law firm, Katz, Marshall, & Banks, to represent him in the current matter. Complainant contends

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<sup>6</sup> *Hu*, ARB No. 2017-0068, slip op. at 7-9. See *Perez v. Citigroup, Inc.*, ARB No. 2017-0031, ALJ No. 2015-SOX-00014, slip op. at 5 (ARB Sept. 30, 2019) (“It is clear that an attempt to apply the terms and remedies of Section 806 outside the United States could lead to frequent conflict with the laws of foreign nations and potentially inconsistent results for employees.”)

<sup>7</sup> *Hu*, ARB No. 2017-0068, slip op. at 10.

<sup>8</sup> “It is not disputed that Complainant’s principal place of employment prior to his resignation in February 2016 was Hong Kong.” Complainant’s Opening Brief, at 41.

<sup>9</sup> *Hu*, ARB No. 2017-0068, slip op. at 11.

Respondent harassed his counsel when Respondent's counsel advised Katz, Marshall, & Banks that: (1) Complainant was not authorized to disclose privileged information, and; (2) Complainant breached his ethical obligations to Respondent by disclosing privileged information to his counsel. Complainant further alleges that the threat by Respondent's counsel to Katz, Marshall, & Banks breached the ethics codes of the D.C. Bar Association because it caused him to breach his own ethical obligations to Respondent, thereby causing his counsel to withdraw their representation before a filing deadline. This action, in turn, forced him to proceed *pro se* to file his claim before the Occupational Safety and Health Administration (OSHA). However, even if Complainant's alleged claims of post-employment retaliation or harassment have merit, they still would not create a domestic application of Section 806 over his claim.<sup>10</sup>

Because the record shows that Complainant's permanent or principal worksite was in Hong Kong during the relevant time period, the facts of this matter do not create a domestic application of Section 806.

## CONCLUSION

For the reasons explained above, we **AFFIRM** the ALJ's decision as correct and the complaint is hereby **DENIED**.

**SO ORDERED.**

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<sup>10</sup> The location of the employee's permanent or principal worksite is the key factor to determine whether a claim is domestic or extraterritorial. Regardless, the alleged conduct is not an adverse employment action that impacted the terms and conditions of his employment nor did Complainant present evidence that the alleged retaliation affected the terms or conditions of any subsequent employment. *See Harvey v. Home Depot U.S.A, Inc.*, ARB Nos. 2004-0114 and -0115, ALJ Nos. 2004-SOX-00020 and -00036 (ARB June 2, 2006) (alleged harassment of a former employee must have impacted the terms or conditions of employment with respondent or have been blacklisting affecting terms or conditions with subsequent employer to be actionable as an adverse employment action).