

U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433



(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 20 January 2015

CASE NO.: 2014-SOX-00020

IN THE MATTER OF

GARY BLANCHARD

Complainant

v.

EXELIS SYSTEMS CORPORATION,

FLUOR INTERCONTINENTAL INCORPORATED

Respondents

APPEARANCES:

HESSAM PARZIVAND

EMIR SEHIC

For the Complainant

AMY L. BESS

SADINA MONTANI

MARK N. MALLERY

ANNE H. BREAUX

For the Respondents

BEFORE: LEE J. ROMERO, JR.

Administrative Law Judge

DECISION AND ORDER GRANTING
MOTION TO DISMISS COMPLAINT

This case arises under the whistleblower provisions of § 806 of the Sarbanes-Oxley Act of 2002 ("SOX"), enacted on July 30, 2002, and codified at 18 U.S.C. § 1514A. SOX prohibits any company with a class of securities registered under § 12 of the Securities Exchange Act of 1934, or required to file reports

under § 15(d) of that Act, from discharging, harassing, or in any other manner discriminating against an employee who reported alleged violations of any rule or regulation of the Securities and Exchange Commission ("SEC"), or any provision of federal law relating to fraud against shareholders. For the reasons set forth below, I find that this case should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

I. PROCEDURAL BACKGROUND

Complainant Gary Blanchard ("Complainant") filed a complaint with the Department of Labor's Occupational Safety and Health Administration ("OSHA") against Exelis Systems Corporation ("Exelis Systems") and Fluor Intercontinental Incorporated ("Fluor") (collectively "Respondents") on or about February 13, 2014. On February 20, 2014, OSHA notified Complainant that it had conducted an investigation of his claim against Respondents. OSHA found that it lacked jurisdiction over the case because Complainant was alleging retaliation for complaining about alleged mail and wire fraud in violation of Department of Defense contract terms while assigned to a Forward Operating Base in Afghanistan. OSHA concluded that adverse actions occurring outside the United States are not covered by SOX § 806 because of the presumption against extraterritorial application of the law.

On March 27, 2014, Complainant appealed OSHA's findings to the United States Department of Labor, Office of Administrative Law Judges. On April 7, 2014, the case was assigned to the undersigned, and on June 5, 2014, Respondents filed a Joint Motion to Bifurcate (or Alternatively, to Dismiss for Lack of Subject Matter Jurisdiction). On June 27, 2014, the case was bifurcated to first address the issue of the extraterritorial application of § 806 of SOX.

On August 8, 2014, Respondents filed a modification to their Joint Motion to Bifurcate (or Alternatively, to Dismiss for Lack of Subject Matter Jurisdiction) seeking to include dismissal based on lack of personal jurisdiction, as well as subject matter jurisdiction. Complainant filed an Opposition to the proposed modification on August 18, 2014, and the undersigned denied Respondents' proposed modification on August 22, 2014.

On September 15, 2014, the undersigned received Respondents' Memorandum in Support of the Joint Motion to Dismiss. Complainant filed a Response on October 3, 2014. On October 16, 2014, Respondents' filed a Reply Memorandum, and Complainant subsequently filed a Surreply on October 24, 2014.

II. FACTUAL ALLEGATIONS¹

Respondent Flour Intercontinental is a United States corporation, organized in California, with a principal place of business in South Carolina, and Respondent Exelis Systems is a United States Corporation organized in Delaware with a principal place of business in Virginia. Both organizations are publically traded and have common stock listed on the New York Stock Exchange. Comp. Brief 2, pp. 12-16.

Complainant was employed in Afghanistan as a civilian employee of various government contractors from 2005 until his termination from Exelis Systems in 2013. He began working with Exelis Systems in April 2010, when Exelis Systems began servicing the government contract on which Complainant had worked for another government contracting company. From April 2013 until his termination in September 2013, Complainant worked exclusively in Afghanistan. Complainant held the position of Security Supervisor for Exelis Systems on the Logistics Civil Augmentation Program IV (LOGCAP IV) at Bagram Air Force Base ("Bagram AFB") in Afghanistan. Resps. Brief 1, pp. 2-3.

Complainant and his team assessed all "Local Nationals" (Afghan nationals) and "Other Country Nationals" (all civilians not considered a U.S. person or citizen) who sought access to Bagram AFB. Complainant and his team would either pass or fail individuals seeking access to Bagram AFB and then submit findings to the U.S. military representative overseeing the operation. Comp. Brief 1, p. 3.

Complainant was supervised by Brandon Spann, Exelis System's Senior Security Supervisor, who in turn was supervised by Kevin Daniel, Exelis System's Personnel Services Regional Manager, both of whom were located in Afghanistan at Bagram AFB. Higher level employees to whom Spann and Daniel reported were

¹ References to the parties' briefs are cited as follows: (1) Respondents' Memorandum in Support of the Joint Motion to Dismiss: Resps. Brief 1, p. __; (2) Complainant's Response to Respondents' Joint Motion to Dismiss: Comp. Brief 1, p. __; (3) Respondents' Reply Memorandum in Support of the Joint Motion to Dismiss: Resps. Brief 2, p. __; and (4) Complainant's Surreply to Joint Motion to Dismiss: Comp. Brief 2, p. __.

also located at Bagram AFB, including Michael Hobbs, Deputy Program Manager. In addition to the support staff on-site at Bagram AFB, Human Resources employees for Exelis Systems in Greenville and Colorado Springs handled matters relating to employees working on the LOGCAP IV contract. Resps. Brief 1, pp. 2-3; Comp. Brief 1, pp. 3-4.

Bagram AFB employees' electronic timesheets were transmitted to Exelis System's Greenville, South Carolina office. At Greenville, Lisa Butler approved the timesheets, and payroll requests were then electronically sent to Ft. Wayne, Indiana for processing and direct deposit. Exelis Systems initiated Complainant's wage payments from a U.S. bank, and his earnings were deposited into Complainant's U.S. bank account. Comp. Brief, pp. 3-4.

Complainant alleges his protected activity centers around his discovery of violations of the Department of Defense security policy and mail and wire fraud on the part of two supervisors. Specifically, Complainant alleges he witnessed Supervisor Spann attempt to cover up a security violation concerning an "Other Country National" that entered Bagram AFB without proper credentials. Complainant confronted Spann about his actions, and when he was rebuffed, he informed Supervisor Daniel of the incident. Subsequent to the security violation, Complainant learned that Daniel was working far fewer hours than what he was reporting on his timesheets for payment at Bagram AFB. By falsifying the number of hours worked and charging an illegal amount of money to the U.S. Government, Complainant believed that such actions also constituted mail or wire fraud. Complainant reported Daniel's actions to Venola Riley, a Bagram AFB employee, in a statement he prepared outlining the various violations he witnessed. He also reported retaliation directly to Sheila Hickman of Exelis Systems in the United States.² Comp. Brief. 1, pp. 4-6.

² Respondent calls into question whether the emails exchanged with Hickman actually reported any whistleblower activity. Respondent claims the email only reports "complaints regarding cliques or favoritism within his department, his supervisors' poor leadership skills, and 'retribution' against him for decisions he made to 'move personnel around.'" The mere mention of "whistleblower," Respondent contends, does not constitute the reporting of mail or wire fraud. Resps. Brief 2, pp. 22-23. As discussed in Section IV, *infra*, the applicable legal standard requires me to view facts in the light most favorable to Complainant. As such, I must accept as true the contention that Complainant reported whistleblower retaliation to Shelia Hickman in the United States.

Complainant alleges that after reporting the above violations, he was demoted, harassed, threatened, and interrogated by his supervisors and Exelis Systems. Spann and Daniel openly exhibited their animosity toward Complainant once he began reporting violations. Exelis Systems HR staff began investigating Complainant personally, rather than asking him for more information regarding Spann and Daniel. Complainant alleges he was cornered in a room by Daniel and Supervisor Carl Lynch, where they provoked him, held him against his will, and informed him that he would be removed from his position. Complainant's office supplies were broken or replaced with antiquated equipment, and his ability to perform minor job duties was taken away. Complainant avers that he worked as the Security Supervisor of the Turnstiles at Bagram AFB from June 2013, until he was terminated. Comp. Brief 1, pp. 6-10.

On September 4, 2013, a request to terminate Complainant from Exelis Systems was sent from Douglas Brown (HR Supervisor at Bagram AFB) to U.S.-based employee, Melanie White (Employee Relations Analyst). Venola Riley and two U.S.-based employees, Yolanda Adrian (HR Generalist for EEO/Compliance) and Danny Langston (Senior HR Supervisor at Greenville), were copied on the email. Melanie White subsequently emailed Yolanda Adrian requesting Complainant's termination, copying U.S.-based employee Jessica Parafiniuk (Senior HR Manager for Talent Acquisition & Retention at Colorado Springs). Yolanda Adrian then forwarded the email to U.S.-based employee Frank Peloso (VP & Director of HR in Colorado Springs). Peloso approved the termination. Melanie White then forwarded the approval to Douglas Brown, copying U.S.-based employee Michal Eitnier (Senior HR Manager for Field Operations in Colorado Springs). Id.

On September 14, 2013, the termination notice was executed in a termination meeting at Bagram AFB, attended by Brown and Nadine Guilbeaux. Complainant was given a termination letter, which stated various reasons why he was terminated for cause, which allegedly differed from the original reasons why Complainant's termination was requested. Daniel Langston and Jack Kraus, two U.S.-based employees, subsequently signed and approved Complainant's termination. Id.

Respondents claim Complainant was terminated following an investigation at Bagram AFB on two separate issues: Complainant's mishandling of classified information and the results of a Climate Survey conducted by Human Resources. Resps. Brief 1, pp. 3-4.

III. CONTENTIONS OF THE PARTIES

In Respondents' Memorandum in Support of the Joint Motion to Dismiss, Respondents aver that the main issue in the case is whether a statutory provision that Congress enacted to regulate domestic conduct gives rise to a private cause of action when the relevant facts underlying the claims took place almost exclusively outside of the United States. Specifically, Respondents argue that the SOX whistleblower provisions do not apply extraterritorially, and the circumstances of the case are not sufficiently connected to the United States to displace the presumption against extraterritorial application.

First, as a threshold matter, Respondents assert that Bagram AFB is not a territory of the United States, as is Guantanamo Bay, for example, which is "within the *constant jurisdiction* of the United States such that *all* U.S. laws apply there." Respondents concede, and Complainant points out, that some laws were enacted with express intent to apply at Bagram AFB, but they do not agree that Bagram AFB is within the constant jurisdiction of the United States such that *all* U.S. laws apply.

Next, because Respondents contend that Bagram AFB is not within the territorial jurisdiction of the U.S., they argue that a textual analysis of SOX § 806 reveals the presumption against extraterritorial application of the whistleblower statute. They point out that there is no express language in the text of § 806 of SOX that warrants extraterritorial application, and they aver that Congress was aware of the Morrison decision (discussed in Section V., *infra*) when it passed the Dodd-Frank Act, part of which amended § 806 of SOX, and yet Congress still did not add any language warranting extraterritorial application. Respondents also argue that other provisions of SOX, namely § 1107, do include extraterritorial language; thus, when Congress includes particular language in one section, but omits it in another section of the same act, it is to be presumed that Congress acted intentionally in the disparate exclusion. Respondents also cite cases where courts have held that SOX and Dodd-Frank whistleblower protections do not apply extraterritorially.

Last, Respondents claim that domestic application of SOX § 806 does not apply to the instant case. Respondents argue that the mere presence of some contacts with the United States is insufficient to overcome the presumption of extraterritoriality. Respondents assert that Complainant's allegations are "extraterritorial by any reasonable definition" because the allegedly corrupt conduct took place in Afghanistan; the discovery of the allegedly corrupt conduct took place in Afghanistan; Complainant's efforts to address the allegedly corrupt conduct took place in Afghanistan; and Complainant's subsequent termination took place in Afghanistan.

In Complainant's Response to Respondents' Joint Motion to Dismiss, Complainant argues that, although he was living and working exclusively in Afghanistan during the alleged incidents giving rise to his whistleblower complaint, he is covered by SOX § 806, nonetheless. He points out that: (1) he is a U.S. citizen; (2) he works for a subsidiary, Exelis Systems Corporation ("Exelis Systems"), of a U.S. publicly traded company, Exelis, Inc. ("Exelis"); (3) he works on a military base "under the territorial jurisdiction of the United States"; (4) Exelis Systems was contracted to promote U.S. national security; (5) the underlying contract is a U.S. contract; (6) Exelis Systems is subject to U.S. criminal laws and "numerous regulations regarding government contract"; (7) the base is under the command of the U.S. armed forces; (8) he engaged in protected activity by complaining about violations of U.S. laws; (9) the conduct he reported included fraudulent representations against the U.S. government; and (10) he was terminated by seven U.S. employees, including an officer of a publicly traded company.

Beyond his allegations of protected activity and retaliation (discussed in Section II, *supra*), Complainant states that the presumption against extraterritoriality does not apply because there is both legal and factual support for jurisdiction based on the text of SOX, the statutory schemes of securities laws, the interpretation of SOX § 806's sister provisions, and the domestic transactions that SOX regulates. He avers that Congress expressed its intent to apply SOX to Bagram AFB by adopting an expansive definition of the word "State," which is incorporated into § 806 and uses the phrase "possession of the US." Complainant avers that military bases are "possessions," according to case law.

Complainant next argues that Congress incorporated by reference the criminal provisions of securities laws, including mail and wire fraud, when it passed the Military Extraterritorial Jurisdiction Act (MEJA). Further, because the criminal provisions of securities laws apply at Bagram AFB, Complainant believes that SOX § 806 whistleblower protections must apply as well by reference as a vehicle of punishing fraud and protecting workers. In addition, Complainant states that securities laws apply to all issuers, including foreign issuers, unless the Securities Exchange Commission specifically excludes foreign issuers. Complainant also argues that SOX § 806 must be interpreted in accordance with its sister provisions, which have been found to apply to foreign entities and officers. Complainant avers that SOX is concerned with the transactions and conditions of the U.S. financial market, a matter of domestic concern. He states that the regulation of the U.S. market inevitably involves the regulation of global companies like Respondents.

Finally, Complainant turns to a brief discussion of Morrison (discussed in Section V., *infra*). He claims that the presumption of extraterritoriality does not apply because domestic securities are a matter of domestic concern, and that Morrison held that regulating transactions in the U.S. does not trigger an extraterritoriality analysis. Should the undersigned find that the presumption does apply, however, Complainant asserts that he overcomes it because he: (1) worked for a U.S. publically traded company; (2) on a U.S. government contract for national security; (3) on a U.S. military base; (4) subject to U.S. laws at all times; (5) he engaged in protected activity by complaining about violations of U.S. law, including fraud, to the U.S.; and (6) he was terminated by U.S. employees.

In their Reply Memorandum in Support of the Joint Motion to Dismiss, Respondents state that the issue in this case is far simpler than that which Complainant suggests. Respondents again aver that Bagram AFB is not a territory within the constant jurisdiction of the United States. Respondents refute Complainant's argument that SOX applies to Bagram AFB because just because some criminal laws apply to Bagram AFB, does not mean that all laws apply there. Respondents point out that Complainant's analysis of "State" in SOX § 806 is misguided, as "State" in no way refers to the jurisdictional reach of SOX. Instead, "State" refers to the idea that whistleblowers under SOX in no way surrender their rights under other laws of other states by availing themselves of whistleblower protections.

Next, Respondents again point out that SOX § 806 is silent as to whether it applies extraterritorially, and thus, the undersigned must presume that it does not. Respondents aver that Complainant ignores the legal precedent regarding extraterritoriality in favor of policy arguments. Respondents agree that the intent of SOX is to protect all segments of the U.S. financial markets, but while this is true, the parties cannot ignore Congress and the holding of Morrison. The fact that other portions of SOX, such as § 1107, do include extraterritorial provisions favors Respondents' argument that Congress intentionally left out the same language in § 806. Moreover, Respondents aver that MEJA does not incorporate SOX, and that the presumption against extraterritoriality is not weaker on military bases.

Lastly, Respondents state that there are not sufficient facts to warrant a domestic application of SOX because only "some" contacts exist linking Complainant to the U.S. Respondents for the second time argue that the allegedly corrupt conduct took place in Afghanistan; the discovery of the allegedly corrupt conduct took place in Afghanistan; Complainant's efforts to address the allegedly corrupt conduct took place in Afghanistan; the reporting of the alleged violations took place in Afghanistan; and the request and execution of Complainant's termination took place in Afghanistan. Moreover, the inclusion of "seven U.S. employees" on the termination approval email from the U.S. does not mean it was "instituted" by those employees, as only one U.S. worker made the approval for Complainant's termination.

In Complainant's Surreply Memorandum in Opposition to the Joint Motion to Dismiss, Complainant again insists that Bagram AFB in Afghanistan is at least a "territory" or "possession" of the United States. Complainant avers the plain language of securities laws and SOX is "vociferously extraterritorial", not silent. He states that the focus of SOX is to protect against corporate fraud. Complainant lastly argues that he has sufficient contacts with the U.S. to allow his claims to proceed. He points out that six other U.S.-based employees participated in his termination; he reported the fraud to a U.S. employee; two of his managers were terminated and removed from Bagram AFB by the U.S. government; and LOGCAP is a U.S. Army regulatory program, which required the interest of U.S. national security.

IV. ISSUE & LEGAL STANDARD

The main issue in this case is whether Complainant may avail himself of the whistleblower protections of § 806 of the Sarbanes-Oxley Act in light of the fact that he was living and working in Afghanistan at all times relevant to his alleged protected activity. Dismissal of whistleblower complaints without a hearing may be appropriate under the summary decision provisions of the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges at 29 C.F.R. §§ 18.40 and 18.41, or less frequently, under Rule 12 of the Federal Rules of Procedure. Dos Santos v. Delta Airlines, Inc., 2013 DOL Ad. Rev. Bd. LEXIS 118, pp. 9-11, ALJ Case No. 2012-AIR-00020 (ALJ Jan. 11, 2013); 29 C.F.R. § 18.1(a) ("The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation."); Neuer v. Bessellieu, ARB No. 07-036, ALJ Case No. 2006-SOX-132 (ARB Aug. 31, 2009) ("The rules governing hearings in whistleblower cases contain no specific provisions for dismissing complaints for failure to state a claim upon which relief may be granted. It is therefore appropriate to apply Fed. R. Civ. P. 12(b)(6), the Federal Rule of Civil Procedure governing motions to dismiss for failure to state such claims.").

I find that review of the issue for dismissal of the case is warranted inasmuch as it will obviate the need for a hearing on the substantive issues of whistleblower protections, should I find that § 806 of SOX does not apply extraterritorially and a domestic application of the law is not warranted.³ I will therefore determine whether Complainant's case should be dismissed under Federal Rule of Civil Procedure 12.

While not affecting the outcome of the decision in this case, it is incorrect to state that the undersigned should analyze this matter based on a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1). Subject matter jurisdiction is established in this case because the parties are

³ 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) govern SOX § 806 actions. Accordingly, to prevail on a SOX claim, a complainant must prove by a preponderance of the evidence that: 1) he or she engaged in activity or conduct that SOX protects; 2) the respondent knew of the protected activity; 3) the respondent took unfavorable personnel action against him or her; and 4) the protected activity was a contributing factor in the adverse personnel action. Sylvester v. Parexel Int'l LLC, ARB No. 07-123, slip op. @ 9-10, ALJ Case Nos. 2007-SOX-00039 & 42 (ARB May 25, 2011).

properly before the undersigned; the proceeding, a SOX § 806 whistleblower dispute, is of a kind or class which the undersigned is authorized to adjudicate; and the claim set forth is not obviously frivolous. See Sasse v. Department of Justice, ARB No. 99-053, slip opinion @ 4, ALJ Case No. 1998-CAA-00007 (ARB Aug. 31, 2000), *citing* West Coast Exploration Co. v. McKay, 213 F.2d 582, 591 (D.C. Cir.), *cert. denied*, 347 U.S. 989 (1954); *see also* Sylvester v. Parexel Int'l LLC, ARB No. 07-123, slip op. @ 7, ALJ Case No. 2007-SOX-00039 & 42 (ARB May 25, 2011) (finding that subject matter jurisdiction clearly existed in a SOX whistleblower retaliation case, and the ALJ erred when he dismissed the case pursuant to Rule 12(b)(1)). Moreover, Congress authorized the Secretary of Labor to issue final agency decisions with respect to claims of retaliation under SOX. 18 U.S.C.A. § 1514A(b); Sylvester, @ 7.

Subject matter jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. It is well settled that the failure to state a proper cause of action calls for a judgment on the merits, and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law, and just as issues of fact, it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court exercises its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. Id. @ 11, *citing* Bell v. Hood, 327 U.S. 678, 681-82 (1946).

In Sylvester v. Parexel International LLC, the ARB chose not to remand the case because nothing in the analysis of the court below turned on the mistake of deciding the matter under a Rule 12(b)(1) motion. It was determined that a remand would only require a new Rule 12(b)(6) label for the same 12(b)(1) conclusion. Id. @ 12. Consequently, the dismissal in this case should be analyzed under a Rule 12(b)(6) standard for failure to state a claim upon which relief may be granted.

However, the heightened pleading standards in federal courts do not apply to SOX claims initiated with OSHA, and motions to dismiss whistleblower complaints under Rule 12(b)(6) are highly disfavored.⁴ See Sylvester, @ 8, 12-13. Unlike

⁴ A SOX claim begins with OSHA, where "no particular form of complaint" is required, except that it must be in writing, and "should contain a full statement of the acts and omissions, with pertinent dates, which are believed

traditional dismissals based on failure to state a claim, where a SOX case would turn on inherently factual issues such as "reasonable belief" and "issues of motive[,]" the dismissal in this case depends on more objective decision-making, such as the extraterritorial application of the law, the location of the alleged protected activity, the location of the alleged retaliation, and the like. Id. @ 13. I am not yet asked to decide the reasonableness of Complainant's whistleblower allegations, which makes the adjudication of the present 12(b)(6) dismissal significantly less subjective.

Further, it has been held that "ALJs are entitled to manage their caseloads and decide whether a particular case is so meritless on its face that it should be dismissed in the interest of justice." Id. While "[d]ismissal of a whistleblower complaint for failure to state a claim may be granted only as a last resort", the instant dismissal is warranted as it involves the inherently jurisdictional issue of

to constitute the violations." 29 C.F.R. § 1980.103(b). OSHA then has a duty, if appropriate, to interview the complainant to supplement a complaint that lacked a prima facie claim. 29 C.F.R. § 1980.104(b)(1). If the complaint, as supplemented alleges a prima facie claim, then OSHA initiates an investigation to determine whether a violation occurred.

In contrast, in federal court, a plaintiff files a formal complaint and serves defendant with the complaint, which is measured against the requirements of Rule 8 and 9 of the Federal Rules of Civil Procedure. Upon the filing of the federal complaint, the defendant may immediately challenge the sufficiency of the pleadings through Rule 12, without waiting for any supplementation. Two United States Supreme Court cases, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009), have heightened the pleading requirements under the Federal Rules of Civil Procedure.

Given the procedural paradigm under which SOX complaints begin, SOX complainants would have to be mindful of these pleading requirements when they file a written statement with OSHA, knowing that their original complaint will be forwarded to an ALJ, if a hearing is requested. Essentially, SOX complainants would be required to file the equivalent of a federal court complaint when they initiate contact with OSHA, which contravenes the express duty that OSHA has to interview the complainant and attempt to supplement the complaint.

Moreover, the Department of Labor expressly rejected such a heightened standard at the complaint stage when it promulgated SOX regulations. See Department of Labor's Rules and Regulations: Procedures for the Handling of Discrimination Complaints under § 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes-Oxley Act of 2002, 29 C.F.R. § 1980, 69 Fed. Reg. 52104, 52106 (Aug. 24, 2004) ("OSHA believes that it would be overly restrictive to require a complaint to include a detailed analysis when the purpose of the complaint is to trigger an investigation to determine whether evidence of discrimination exists.").

extraterritorial application of SOX. Dos Santos, at 13 (internal quotations omitted).

Based on the Board's action in the above-cited cases and for the reasons I have set forth, I conclude that Rule 12(b)(6) is an appropriate vehicle to address the extraterritorial nature of Complainant's complaint under SOX § 806.⁵ Consequently, I find it is not necessary to address the issue as a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

Under Rule 12(b)(6), all reasonable inferences are made in the non-moving party's favor. Neuer, @ 4. The burden is on the complainant to frame a complaint with enough facts to state a claim for relief that is plausible on its face. Id. The complaint must be liberally construed in favor of the complainant, and all facts pleaded in the original complaint must be taken as true. Roux v. Pinnacle Polymers, L.L.C., No. CIV.A. 13-369, 2014 WL 129815, at *1 (E.D. La. Jan. 14, 2014). However, the undersigned is not bound by the complainant's legal conclusions, as the purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. Id. Bond v. Rexel, Inc., No. 5:09-CV-122, 2011 WL 1578502, at *3 (W.D.N.C. Apr. 26, 2011).

V. LEGAL PRECEDENT & DISCUSSION

The following section includes a discussion of the legal precedent relevant to the issues in this case. I will then decide whether, given the current binding precedent, Complainant has a claim entitled to relief.

A. Is Bagram AFB a territory of the United States?

The threshold issue I must determine before any discussion of extraterritoriality unfolds in this matter is whether or not Bagram AFB, where Complainant was living and working at the time of the alleged protected conduct giving rise to a whistleblower complaint, is indeed a territory of the United States, so as to moot any issue of the extraterritorial application of SOX § 806.

⁵ There are a number of other cases where the issue of extraterritoriality was not decided under a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, and instead under a 12(b)(6) motion to dismiss for failure to state a claim. See, e.g., Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010); Norex Petroleum Ltd. V. Access Industries, Inc., 631 F.3d 29 (2010) ("[W]e hold that this issue is properly considered as a question of whether the complaint states a claim for which a United States federal court can provide relief, not as a question of whether the court possesses subject matter jurisdiction to hear the claim.").

Some United States military bases are "territories" of the U.S. for purposes of the applicability of all U.S. laws. Guantanamo Bay, for example, is considered to be "within the constant jurisdiction of the United States." Al Maqaleh v. Hagel, 738 F.3d 312, 327 (D.C. Cir. 2013), *citing* Boumediene v. Bush, 128 S. Ct. 2229, 2261 (2008). Indeed, the United States "has maintained its total control of Guantanamo Bay for over a century, even in the face of a hostile government maintaining *de jure* sovereignty over the property." Id., *citing* Al Maqaleh v. Gates, 605 F.3d 84, 97 (D.C. Cir. 2010).

In contrast, at Bagram AFB, "while the United States has options as to the duration of the lease agreement, there is no indication of any intent to occupy the base with permanence, nor is there hostility on the part of the 'host' country. Therefore, the notion that *de facto* sovereignty extends to Bagram" does not apply. Id. The Al Maqaleh case makes clear that these distinctions are critical and, thus, I conclude Bagram AFB is not a U.S. territory, nor "within constant jurisdiction of the United States" because "American control over Bagram and its detention facilities lacks the permanence of U.S. control over Guantanamo." Id. at 238. The distinction between Guantanamo Bay (where *de facto* sovereignty exists) and Bagram AFB (where *de facto* sovereignty does not exist) was also acknowledged in Ali v. Rumsfeld, where the court found that "[t]he United States has not demonstrated an intent to exercise sovereignty over Bagram with permanence." 649 F.3d 762, 772 (D.C. Cir. 2011). As a result, I find SOX § 806 does not apply to Bagram AFB because Bagram AFB is not a territory of the United States where United States laws apply. Any other argument attempting to characterize Bagram AFB as a "possession" of the United States where U.S. laws apply is incorrect in light of this binding precedent.

B. Does SOX § 806 apply extraterritorially? If not, do the facts of the complaint warrant domestic application of SOX § 806?

Having concluded that Bagram AFB is not a territory of the United States, the next issue I must consider is whether SOX § 806 applies extraterritorially, and if not, whether the facts of the complaint warrant domestic application of the statute.

Morrison v. National Australia Bank Ltd. is the leading Supreme Court case establishing the legal standards for extraterritorial application of whistleblower laws. In that

case, the Supreme Court considered the question of the extraterritorial application of the SEC anti-fraud laws. Specifically, the Court decided whether the Securities Exchange Act Section 10(b) provided for a cause of action for foreign plaintiffs suing United States defendants for misconduct in connection with securities traded on foreign exchanges. The Court made the first modern pronouncement against extraterritoriality in the context of statutory construction, and ultimately, the Court held that Section 10(b) did not apply extraterritorially, and that the alleged fraud did not occur domestically. See 561 U.S. 247 (2010).

The legal controversy underlying the Morrison case arose out of allegations by foreign investors in National Australia Bank Limited ("National"), the largest bank in Australia, that HomeSide Lending, Inc. ("HomeSide"), a Florida mortgage service business purchased by the bank and HomeSide's officers manipulated financial models to make the company's mortgage-servicing rights appear more valuable than they really were. The investors claimed that National and its CEO were aware of the misrepresentations to this effect made in the bank's annual reports, public statements, and other public documents. They also claimed that the subsequent write-down of HomeSide's assets on two occasions, necessary because of the deceptions and totaling more than \$2 billion, resulted in losses to the investor plaintiffs that were recoverable under the Securities and Exchange Act of 1934 and an SEC rule promulgated pursuant to the Act. Id. at 251-53.

Shares of National stock were traded on the Australian Stock Exchange and on other foreign securities exchanges, but not on any securities exchange in the United States. The bank did, however, list American Depositary Receipts ("ADRs"), which represent the right to receive a specific number of a foreign-listed entity's shares, on the New York Stock Exchange. By the time the case was heard by the Second Circuit and then the Supreme Court, the plaintiffs in the case were solely Australian citizens who had purchased shares of the bank prior to the write-downs. Id.

The plaintiffs brought suit against National, HomeSide, and officers of the two companies in the Southern District of New York for securities law violations under sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. Id. The District Court granted the defendant's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim, finding that the court had no jurisdiction over

the case because of the minimal connection between the conduct at issue and the United States. Id. at 253. The Court of Appeals for the Second Circuit affirmed the District Court's decision on a similar basis, stating that the alleged conduct in the United States did not "compris[e] the heart of the alleged fraud." Id. at 253 (internal quotations omitted).

The United States Supreme Court affirmed the Second Circuit, not on the basis of lack of subject matter jurisdiction, but on the basis of petitioners' failure to state a claim. Id. at 254. The broader import of the decision, however, is that the Court dismissed the long-used Second Circuit "conduct-and-effects" test for determining whether a securities law has extraterritorial effect. Id. at 256-61.

The first step in the Court's analysis asked whether the applicable statutory provision reached extraterritorial claims. The Court made its pronouncement under the principle of statutory interpretation that a statute does not have extraterritorial effect unless a contrary intent appears: "It is 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." Id. at 255 (internal quotations omitted). The presumption was based on the idea that "Congress ordinarily legislates with respect to domestic, not foreign matters." Id. at 255.

The Court indicated its allegiance to this "canon of construction," which it also called a "presumption about a statute's meaning," not a "limit upon Congress's power to legislate." The Court characterized the Second Circuit's "conduct-and-effects" test as an invitation to "discern" Congressional intent.⁶ Id. at 255. The Court noted that the Second Circuit and other federal courts of appeals had in many cases over the decades adopted this approach in determining the application of the Securities Exchange Act, and particularly Section 10(b), to fraud schemes with conduct and effects outside the United States. Id. at 255-56.

"The criticisms [of the conduct-and-effects test] seem to us justified. The results of judicial-speculation-made-law-[divining what Congress would have wanted] if it had thought of

⁶ The now-overruled "conducts-and-effects" test asked: 1) whether the wrongful conduct had a substantial effect in the United States or upon United States citizens; and 2) whether the wrongful conduct occurred in the United States. The Court criticized this test in that it was not easy to apply and led to varying results. Morrison, at 257-61.

the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.” Id. at 261. In addition, the presumption against extraterritoriality reflects the idea that “United States law governs domestically but does not rule the world.” Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (U.S. 2013) (internal citations omitted).

Thus, the Court applied the presumption against extraterritoriality to the statutory language of Section 10(b) and Rule 10b-5. Morrison, at 262-65. The Court found that the statutory language itself did not indicate that it applies abroad because even the use of the term “interstate commerce” in the statute was not enough to establish extraterritorial reach. In addition, reference to “foreign commerce” in the definition of “interstate commerce” (“trade, commerce, transportation, or communication . . . between any foreign country and any State”) does not defeat the presumption. Similarly, the fleeting reference in the Congressional statement of purpose of the Securities Exchange Act to the dissemination and quotation abroad of the prices of securities traded in domestic exchanges and markets cannot overcome the presumption against extraterritoriality. Id. at 262-63. The context of the statute also did not change the result. Moreover, the Court pointed to Sections 30(a) and 30(b) of the Securities Exchange Act, which specifically address the extraterritorial application of the Securities Exchange Act, as evidence that Congress intended to make certain provisions, rather than the entirety, of that law have extraterritorial effect. “Its explicit provision for a specific extraterritorial application would be quite superfluous if the rest of the Securities Exchange Act already applied to transactions on foreign exchanges. . . .” Id. at 263-65.

In Liu Meng-Lin v. Siemens AG, the court found that the Dodd-Frank Act whistleblower provisions did not contain any language to indicate that the law applied extraterritorially. 763 F.3d 175, No. 13-4385-cv, slip op. @ 3 (2d Cir. 2013). The court also held that other sections of the Dodd-Frank Act that do have some indication of extraterritorial application did not mean that the whistleblower provision applied extraterritorially. Instead, the court stated, “Liu’s argument inverts the ordinary cannons of statutory interpretation.” Id. at pp. 13-14. “Where Congress includes particular language in one section of a statute, but omits it in another section in the same Act, it is generally presumed that Congress acts

intentionally and purposefully in the disparate inclusion or exclusion.'" Id. citing Rusello v. United States, 464 U.S. 16, 23 (1983) (alteration omitted). The court also rejected Liu's argument that SEC regulations should be accorded weight in determining congressional intent with respect to the extraterritorial application of a statute. Id. at p. 17. Specifically the court stated, "[N]o regulation could supply on Congress's behalf, the clear legislative intent required to overcome the presumption against extraterritoriality." Id. at p. 18 (internal quotations omitted).

In light of the above-referenced cases, it is clear that Congress did not intend SOX § 806 to apply extraterritorially. Because there is no express congressional intent in the language of § 806 for the statute to apply extraterritorially, it must be assumed that this silence implies only territorial application of the law. All other arguments on the part of Complainant to extrapolate some other statutory interpretation from § 806 are incorrect. In addition, Complainant's other unsuccessful arguments based on the interpretation of other laws, regulations, and SOX provisions are wholly inappropriate in attempting to establish the extraterritorial application of SOX § 806. Morrison, the relevant Supreme Court precedent, and Liu Meng-Lin foreclose on any other finding.

The next step in the Morrison Court's analysis asked whether, given the facts alleged, the extraterritorial application of the statute was required to enforce the complaint. In other words, having applied the presumption against extraterritoriality and having found that the statute did not apply abroad, do the facts alleged constitute a *territorial United States* claim and do they warrant the domestic application of SOX § 806? Id. at 266-73.

To draw the line between domestic and foreign claims, the focus of congressional concern of the statute must be identified. Morrison, at 266. In Morrison, the court used the Aramco decision, 499 U.S. 244 (2006), to illustrate its point. In that case, the Title VII plaintiff was an American citizen and hired in Houston. The Aramco Court concluded, however, that neither the territorial event of hiring, nor the plaintiff's American citizenship was concerned with focus of Title VII's congressional concern, which is indisputably domestic employment. Id. at 266. The Second Circuit in Mastafa v. Chevron Corporation, for example, held that neither U.S. citizenship of the defendants, nor their presence in the United States, was of relevance to warrant domestic application of the

claim to the Alien Tort Statute, which is concerned with a violation of the law of the nations or a treaty of the United States. See generally Mastafa v. Chevron Corp., 770 F.3d 170 (2d Cir. 2014). Moreover, "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the 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." Morrison, at 266.

As such, the Court made clear that the mere presence of *some* contacts with the United States will not be sufficient to overcome the presumption against extraterritorial application of U.S. laws. Norex Petroleum Ltd. v. Access Industries, Inc., *supra* at 33. "[E]ven where the claims touch and concern the territory of the United States, they must do so with significant force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." Kiobel, *supra* at 1669 (finding that the Alien Tort Statute did not apply extraterritorially and that the operative facts were insufficient to warrant domestic application of the statute).

It has been held that the second step of the Morrison test is itself dual layered. Dos Santos, at 19; Villaneuva v. Core Laboratories, NV, ARB Case No. 09-108, slip op. @ 10-11 & FN 22, ALJ Case No. 2009-SOX-00006 (ARB Dec. 22, 2011). A court should identify the "primary focus" of the statute in general, and unless the subject complaint completely falls outside that basic focus, the court should also identify the "additional focus" of the provision. Dos Santos, at 19. In determining what conduct is relevant and significant in a § 806 SOX whistleblower complaint, courts have identified the primary focus of SOX as preventing and uncovering corporate financial fraud, criminal conduct in corporate activity, and violations of securities and financial reporting laws. Villaneuva, at 10-11. In addition, the labor elements of SOX § 806 play a significant role in furthering the deterrence of corporate fraud by affording protections to whistleblowers who report illegal conduct. Thus, as the "additional focus" of SOX, the location of whistleblower conduct is also relevant in the Morrison analysis. Dos Santos, at p. 19; Villaneuva, at 10-11. In Dos Santos v. Delta Airlines, Inc., a case analyzing the extraterritorial application of AIR-21, the court analyzed: (1) the location of the protected activity and the underlying violation; (2) the

location of the retaliatory actions; and (3) the location of the employee and employer. Dos Santos, at 66-74.

Applying this reasoning to the facts of the case, the Court in Morrison found that connections of the case to the United States related to the manipulation of HomeSide's financial models and misleading public statements made there. Id. at 266. However, that conduct was not the basis of the petitioners' legal claims. The Court noted that the focus of the Securities Exchange Act is on purchases and sales of securities, which according to the facts did not take place in the United States, not the deceptive conduct that the petitioners alleged took place in the United States. Id. at 266-267. The Court found that Section 10(b) "reaches the use of manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on [a domestic exchange,]. . . .and all aspects of the purchase complained of by those petitioners who still have live claims occurred outside the United States." Accordingly, it held that the petitioners failed to state a claim, and affirmed the dismissal of the complaint on that ground. Id. at 273.

In Liu Meng-Lin v. Siemens AG, Plaintiff-Appellant alleged that Defendant-Appellee violated the whistleblower anti-retaliation provision of the Dodd-Frank Act. The court concluded: (1) legislation is presumed to apply only domestically unless there is evidence congress intended otherwise; (2) there is no indication Congress intended the whistleblower provisions of Dodd-Frank to have extraterritorial application; and (3) the facts in the complaint unequivocally demonstrated that applying the statute to the case would constitute an extraterritorial application of the law. 763 F.3d 175, No. 13-4385-cv, slip op. @ 3 (2d Cir. 2013). In holding that the facts of the complaint were "extraterritorial by any reasonable definition", the court found that "Liu was a resident of Taiwan employed by the Chinese subsidiary of a German company; he reported to superiors in China and Germany regarding allegedly corrupt activities that took place in China, North Korea, and Hong Kong; and his employers decided, apparently in China and/or Germany, to terminate his employment. In short, the whistleblower, his employer, and the other entities involved in the alleged wrongdoing are all foreigners based abroad, and the whistleblowing, the alleged corrupt activity, and the retaliation all occurred abroad." Id. at 9-10.

Liu argued that because Siemens has securities listed on an American exchange, his case was fundamentally distinguishable from Morrison. The court found that argument unavailing, stating that where a plaintiff can only point 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 securities alone is the sort of fleeting connection that cannot overcome the presumption against extraterritorial application. Id. at 11.

The indisputable focus of congressional concern of SOX § 806 is to protect against corporate fraud, criminal conduct, and violations of securities and financial reporting laws on American exchanges. As such, and as Morrison and Liu Meng-Lin dictate, the Complainant must establish his connection to this initial focus, which he is able to do without issue. Accepting all the facts proffered by Complainant as true and construing them in the light most favorable to him, I find that Respondents were both U.S. corporations. Respondent Flour Intercontinental is a United States corporation, organized in California, with a principal place of business in South Carolina, and Respondent Exelis Systems is a United States Corporation, organized in Delaware, with a principal place of business in Virginia. Both organizations are publically traded and have common stock listed on the New York Stock Exchange.

However, this mere corporate presence in the United States and participation in the NYSE will not suffice on its own. Complainant needs a greater connection to the U.S. to warrant domestic application of SOX § 806. Because the additional focus of SOX § 806 is to protect whistleblowers who report fraud, thereby encouraging the reporting of such abuse, Complainant's connections to the U.S. must involve: (1) the location of the allegedly illegal conduct; (2) the location of the discovery of the allegedly illegal conduct; (3) the location of the protected activity and the efforts to address the allegedly illegal conduct; and (4) the location of the retaliation. Even construing the facts in the light most favorable to the Complainant according to the legal standard for this motion to dismiss, I still find that Complainant does not establish a significant enough connectivity to the United States to warrant the domestic application of SOX § 806.

Specifically, the location of the allegedly illegal conduct took place in Afghanistan at Bagram AFB. Complainant avers that he witnessed various instances of mail and wire fraud on the

part of Spann and Daniel, who were also stationed at Bagram AFB. The instance with Spann involves an alleged violation of the Department of Defense security policy when Spann allegedly attempted to cover up a security violation concerning an "Other Country National" that entered Bagram AFB without proper credentials. Subsequent to the security violation, Complainant learned that Daniel was working far fewer hours than what he was reporting on his timesheets for payment at Bagram AFB. By falsifying the number of hours worked and charging an illegal amount of money to the U.S. Government, Complainant believed that such actions also constituted mail or wire fraud. As a result, not only did the location of the allegedly illegal conduct take place Afghanistan, so too did the location of Complainant's discovery of this conduct. At all times relevant, Complainant was stationed at Bagram AFB, and he reported his witnessing of the alleged violations as violations at Bagram AFB.

Next, the location of the efforts to address this allegedly illegal conduct and the protected activity also took place largely in Afghanistan. First, Complainant confronted Spann about his actions at Bagram AFB, and when he was rebuffed, he informed Supervisor Daniel of the incident. Next, Complainant reported Daniel's actions to Venola Riley, a Bagram AFB employee, in a statement he prepared outlining the various violations he witnessed. Finally, he also reported retaliation directly to Sheila Hickman in the United States via email. Although Respondents call into doubt this last contention, I must accept it as true, nonetheless. Still, this one email cannot overcome the fact that the location of the protected activity and the efforts to address the allegedly illegal conduct took place mostly in Afghanistan at Bagram AFB, apart from the communication with Sheila Hickman.

Last, the location of the adverse actions took place mainly in Afghanistan. Complainant argues Spann and Daniel openly exhibited their animosity toward him at Bagram AFB once he began reporting violations. Exelis Systems HR staff began investigating Complainant personally, rather than asking him for more information regarding Spann and Daniel. Complainant alleges he was cornered in a room at Bagram AFB by Daniel and Supervisor Carl Lynch, where they provoked him, held him against his will, and informed him that he would be removed from his position. Complainant's office supplies in Bagram AFB were broken or replaced with antiquated equipment, and his ability to perform minor job duties was taken away. Complainant avers that

he worked as the Security Supervisor of the Turnstiles at Bagram AFB from June 2013, until he was terminated.

The decision to terminate Complainant originated at Bagram AFB in Afghanistan on September 4, 2013. A request to terminate Complainant was sent from Douglas Brown (HR Supervisor at Bagram AFB) to U.S.-based employee, Melanie White (Employee Relations Analyst). Venola Riley and two U.S.-based employees, Yolanda Adrian (HR Generalist for EEO/Compliance) and Danny Langston (Senior HR Supervisor at Greenville), were copied on the email. Melanie White subsequently emailed Yolanda Adrian requesting Complainant's termination, copying U.S.-based employee Jessica Parafiniuk (Senior HR Manager for Talent Acquisition & Retention at Colorado Springs). Yolanda Adrian then forwarded the email to U.S.-based employee Frank Peloso (VP & Director of HR in Colorado Springs). Peloso approved the termination. Melanie White then forwarded the approval to Douglas Brown, copying U.S.-based employee Michal Eitnier (Senior HR Manager for Field Operations in Colorado Springs).

Accepting all of these facts as true, specifically the inclusion of "seven U.S. employees" on the approval emails, the request and execution of Complainant's termination still took place exclusively in Afghanistan. Moreover, the inclusion of the "seven U.S. employees" on the termination approval email from the U.S. does not mean it was "instituted" by those employees, as only one U.S. worker (Frank Peloso) made the approval for Claimant's termination. Others in the email chain simply stated, "I agree with this termination," but did not presumably have the authority to actually sign off on the approval of the termination.

On September 14, 2013, the termination notice was executed in a termination meeting at Bagram AFB, attended by Brown and Nadine Guilbeaux. Complainant was given a termination letter, which stated various reasons why he was terminated for cause, which allegedly differed from the original reasons why Complainant's termination was requested. Daniel Langston and Jack Kraus, two U.S.-based employees, subsequently signed and approved Complainant's termination. As such, the execution of the termination took place in Afghanistan at Bagram AFB.

In totality, it is clear that Complainant's connections with the United States are weak. As previously stated, mere corporate presence in the United States is insufficient, and the location of the relevant labor elements of Complainant's whistleblower complaint is overwhelmingly focused in

Afghanistan. Although the relevant precedent could have led to a different result had Complainant chosen to involve more U.S.-based employees in his reporting or happened to discover U.S.-based fraud, I am nonetheless bound by the facts of this case and the policy reasons behind the Morrison decision. Again, "United States law governs domestically but does not rule the world." Kiobel v. Royal Dutch Petroleum Co., *supra* at 1664 (internal citations omitted).

However, in attempting to establish further contacts with the United States, Complainant argues that he is a U.S. citizen; (2) he works for a subsidiary of a U.S. publically traded company; (3) he works on a military base "under the territorial jurisdiction of the United States"; (4) the company was contracted to promote U.S. national security; (5) the underlying contract is a U.S. contract; (6) the company is subject to U.S. criminal laws and "numerous regulations regarding government contract"; (7) the base is under the command of the U.S. armed forces; (8) he engaged in protected activity by complaining about violations of U.S. laws; (9) the conduct he reported included fraudulent representations against the U.S. government; and (10) he was terminated by seven U.S. employees, including an officer of a publically traded company. In addition, he states that his payments came from Respondents' U.S. bank and were directly deposited into Complainant's U.S. bank. These additional facts are irrelevant, as they do not speak to either focus of congressional concern of SOX § 806. These facts carry no weight in my analysis.

As such, and under the applicable precedent of Morrison, Kiobel, Rusello, Armaco, Liu Men-Lin, Mastafa, Norex, Dos Santos, and Villaneuva, I cannot conceivably find that Complainant stated a cause of action on which he can survive a motion to dismiss for failure to state a claim.

Finally, once the relevant and significant conduct is identified in light of the focus of congressional concern of the statute, the undersigned must make a preliminary determination whether that conduct may in fact be relied upon in establishing a valid claim to survive a 12(b)(6) motion for failure to state a claim. Mastafa, 770 F.3d at 186 ("Where a complaint alleges domestic conduct of the defendant (that, the court determines, displaces the presumption against extraterritoriality), *but* such conduct does not satisfy even a preliminary assessment of the merits, the court may not rely on that conduct for its extraterritoriality analysis."). The elements needed to establish a valid whistleblower claim under § 806 of SOX are the

following: a complainant must prove by a preponderance of the evidence that 1) he or she engaged in activity or conduct that SOX protects; 2) the respondent knew of the protected activity; 3) the respondent took unfavorable personnel action against him or her; and 4) the protected activity was a contributing factor in the adverse personnel action. Sylvester v. Parexel Int'l LLC, *supra* @ 9-10.

Because I have found that SOX § 806 does not apply extraterritorially to Bagram AFB in Afghanistan, and Complainant has not stated a claim that warrants domestic application of the law, I find no reason to consider the substantive issues of the reasonableness of Complainant's belief of the alleged illegal conduct and whether he has established a valid whistleblower complaint.

VI. CONCLUSION

In light of the above discussion, I find that:

1. The relevant legal standard derives from a 12(b)(6) motion to dismiss for failure to state a claim, and not from a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.
2. SOX § 806 does not apply extraterritorially to Bagram AFB in Afghanistan;
3. Complainant does not have sufficient U.S. contacts to warrant a domestic application of SOX § 806; and
4. Because Complaint does not have sufficient contacts to warrant a U.S. application of the law, I need not discuss whether he has stated a valid whistleblower complaint under SOX § 806.

In view of the foregoing, the claim is hereby **DISMISSED**.

ORDERED this 20th day of January, 2015, at Covington, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1980.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1980.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only)

consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.109(e) and 1980.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1980.110(b).