



Issue Date: 14 June 2016

OALJ No.: 2015-SOX-00019
OSHA No.: 2-4173-15-066

In the Matter of:

ANDRAS DOBAK
Complainant,

v.

REMY INTERNATIONAL, INC.
Respondent.

**DECISION AND ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DECISION**

This matter arises under Section 806 (the employee protection provision) of the Sarbanes-Oxley Act of 2002, as amended ("Sarbanes-Oxley," "SOX" or "the Act"), 18 U.S.C. §1514A, and its implementing regulations found at 29 C.F.R. Part 1980 and Part 18, Subpart A. Section 806 provides "whistleblower" protection to employees of publicly traded companies against discrimination by employers in the terms and conditions of employment because of certain "protected activity" by the employee. More specifically, 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, Respondent's Motion for Summary Decision should be **GRANTED** and this matter should be **DISMISSED**.

I. Procedural background

Andras Dobak ("Complainant") filed a complaint with the Department of Labor's Occupational Safety and Health Administration ("OSHA") against Remy International, Inc. ("Respondent" or "Remy International") on or about November 25, 2014. In that complaint, Complainant alleged that Respondent terminated his employment on July 7, 2014, after his reporting tax-avoiding compensation schemes, inflated sales figures and false safety reporting practices.

By letter dated April 24, 2014, OSHA notified Complainant of its finding that it lacked jurisdiction over the case because “[t]he evidence does not show sufficient nexus between the alleged adverse action and the U.S. company to establish jurisdiction,” noting Complainant is an Hungarian citizen who was employed in Hungary pursuant to an Hungarian contract for an Hungarian subsidiary of Respondent.

By letter dated May 28, 2015 which was received on June 2, 2015, Complainant, through his counsel, appealed OSHA’s finding to the United States Department of Labor, Office of Administrative Law Judges (“OALJ”). On or about June 29, 2015, the case was assigned to the undersigned, and on July 2, 2015, I issued an Initial Prehearing Order And Notice Of Hearing (“Hearing Notice”) setting this matter for hearing on January 6, 2016, and outlining prehearing directives to the parties.

An Order Changing Case Caption was issued on July 29, 2015 to identify Remy International as Respondent in this matter. The Hearing Notice had listed “Remy Automotive Hungary, LLC” as Respondent in its case caption based on the April 24, 2014 OSHA notice of its findings.¹

In response to Complainant’s request by letter dated November 30, 2015 for a six-month suspension of all deadlines in the Hearing Notice due to Complainant’s unspecified medical condition, I issued an Order on December 1, 2015 scheduling a telephonic conference with the parties for December 8, 2015. After that conference, I issued an Order on December 11, 2015 requiring Complainant to submit supporting documentation from a medical care provider to address his medical condition and holding the matter in abeyance.

In accordance with directives outlined in the Hearing Notice, Respondent timely submitted its Motion for Summary Decision (“Respondent’s Motion”) and Brief in Support with a cover letter dated December 7, 2015.

Based on the insufficiency of Complainant’s response to my December 11, 2015 Order, Complainant’s request for a six-month extension of time to comply with the deadlines in the Hearing Notice was denied in an Order issued on January 12, 2016. In that Order, Complainant was also directed to submit a response to Respondent’s Motion.

On March 8, 2016, Complainant’s “Opposition To Respondent’s Motion For Summary Decision” (“Opposition”) was received. Respondent was granted an opportunity to submit a reply to Complainant’s Opposition and Respondent’s “Reply In Support Of Motion For Summary Decision” (“Reply”) was received on April 4, 2016.

¹ This office received a letter on July 23, 2015 from an OSHA Regional Supervisor that the OSHA finding notice incorrectly named Remy Automotive Hungary, LLC as Respondent in this matter. In a letter from his counsel dated June 27, 2015 and received by OALJ on July 7, 2015, Complainant agreed that Remy International is the properly named as Respondent in this matter.

II. Contents of the Record

In addition to Respondent's Motion, Complainant's Opposition and Respondent's Reply and the documents included with those submissions (i.e., Respondent's Brief in Support with Exhibits; Complainant's Declaration), the substantive record before the OALJ consists of the following:

- Complainant's OSHA complaint, i.e., letter from his attorney, dated November 25, 2014 and received by OSHA on December 8, 2014
- Letter acknowledging receipt of OSHA complaint dated December 18, 2014
- Secretary's Findings and Order from OSHA dismissing the complaint, dated April 24, 2015 (3 pages)²
- Complainant's objection to the Secretary's Findings and Order and hearing request dated May 28, 2015 received on June 2, 2015 (2 pages)
- Complainant's further objection to the Secretary's Findings and Order dated June 27, 2015 and received on July 7, 2015 (5 pages, excluding attachments)³
- Letter from OSHA Regional Supervisory Investigator dated July 23, 2015 correcting the case caption provided in the Secretary's Findings and Order from OSHA to reflect Remy International, Inc. (not Remy Automotive Hungary, LLC) as Respondent
- Notice of Appearance of counsel for Respondent and Respondent's Answer to Complainant's objection to the Secretary's Findings and Dismissal dated August 5, 2015.

III. Parties' contentions

In its Brief in Support of its Motion for Summary Decision ("Respondent's Brief"), Respondent contends that this case is appropriate for summary decision for the following reasons: (1) SOX whistleblower protection provisions do not apply extraterritorially, i.e., outside of the United States, and so Complainant's claim is not covered under SOX; (2) Complainant is unable to meet his burden of establishing every element of his retaliation claim under SOX, if so covered, i.e., protected activity, adverse action by Respondent and causal connection between

² Per 29 C.F.R. § 1980.105(b), the only documents of which copies are transmitted to the Chief Administrative Law Judge, upon OSHA's completion of its investigation, are the original complaint and the findings and order. Thus, the full investigation is not of record, and is not before me.

³ The parties have 30 days from receipt of the Secretary's Findings to file objections and request a hearing. *See* 29 C.F.R. § 1980.106(a). Respondent contends that "[i]t would be appropriate...to strike" this further objection from Complainant as untimely. Respondent's Brief at 3, n. 2.

such activity and adverse action; and (3) Respondent would have terminated Complainant's employment regardless of his alleged protected activities. Respondent extensively cites the Administrative Review Board ("ARB") decision in the matter of *Villanueva v. Core Labs., NV & Saybolt de Colombia Limitada*, ARB No. 09-108, ALJ No. 2009-SOX-00006 (ARB Dec. 22, 2011) (en banc) and its application of the United States Supreme Court's ruling in *Morrison v. Nat'l Australia Bank*, 561 U.S. 247 (2010), as well as the federal circuit court decision in *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 177; 179 (2d Cir. 2014).

In his Opposition, Complainant contends that he reported to executives within the U.S. company and so there is coverage and jurisdiction under SOX. He cites the case of *O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008) in support of his position and distinguishes this case from *Villanueva v. Core Labs.*, ARB No. 09-108, ALJ No. 2009 SOX-00006 (ARB Dec. 22, 2011) (en banc), *aff'd sub nom on different grounds, Villanueva v. U.S. Department of Labor*, 743 F.3d 103 (5th Cir. 2014). Complainant also contends that he can establish the elements of a prima facie case, i.e., he made complaints to his superiors in the United States about "fraudulent tax schemes," "false and inflated sales figures" and "false safety reporting practices" which "could reasonably be believed to perpetrate fraud on shareholders," and that he was constructively or actually terminated because of such complaints.

Respondent's Reply maintains that SOX does not apply extraterritorially and Complainant has alleged only violations of foreign laws. Respondent's Reply also contends that Complainant errs in reliance on *O'Mahony* as the United States Supreme Court rejected its 'conducts and effects test' in *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010).

IV. Issues presented

The threshold issue in this case is as follows: is the claim covered under the whistleblower protections of § 806 of the Act considering Complainant was living and working in Hungary at all times relevant to his alleged protected activity; if the claim is so covered, did Complainant engage in protected activity under § 806 of the Act.

V. Undisputed facts

Respondent Remy International manufactures and re-manufactures rotating electrics and sells them to original equipment ("OE") manufacturers. Respondent's Brief, Exhibit ("Ex.") 5 (Declaration of Shawn Pallagi) at ¶ 3. The product line in Europe includes alternators and starter motors. *Id.* Remy International was incorporated in the United States and was publicly held, listing its shares on the NASDAQ.⁴ *Id.* at ¶ 4.

Remy International has domestic and foreign subsidiaries, including Remy Automotive Hungary ("Remy HU") that are not publicly-held, do not have securities registered under Section

⁴ According to Respondent, since the filing of the complaint at issue in this matter, "Remy International, Inc. was converted to Remy Holdings, Inc. and later Remy Holdings LLC" – "a non-publicly traded subsidiary two layers down from the prior publicly traded company, Remy International, Inc., which was recently acquired by BorgWarner Inc.," and as a result, Remy International, Inc. was "delisted from NASDAQ." Respondent's Brief at 4, n. 4. Complainant's Opposition did not dispute this conversion and delisting of "Remy International."

12 of the Securities Exchange Act, and do not file reports under Section 15(d) of the Act. *Id.* Those subsidiaries operate in accordance with and subject to the laws of the countries under which they are constituted. *Id.*

Complainant served as Director of Human Resources for European Operations for Respondent from November 1, 2012 until July 7, 2014. *Id.* at ¶¶ 6, 8; Complainant’s Declaration (“Decl.”) at ¶ 12.⁵ At all times during Complainant’s employment with Respondent, he worked in Europe: Complainant had responsibility for human resources functions related to two Hungarian manufacturing operations; a manufacturing facility in Tunisia; a distribution facility in the United Kingdom; a distribution facility in Belgium; and sales personnel throughout Europe. Respondent’s Brief, Ex. 5 at ¶ 10; Complainant’s Decl. at ¶¶ 3, 7 and 8.

An employment contract was signed by Complainant, a representative of Remy International, Senior Vice President and Chief Human Resources Officer, Gerald T. Mills, and a representative of Remy HU. Respondent’s Brief, Ex. 5 (Decl. of Shawn Pallagi, Ex. C). Mr. Mills was later replaced by Shawn Pallagi. Complainant’s Decl. at ¶ 3.

During his tenure with Respondent, Complainant reported to the Senior Vice President and Chief Human Resources Officer and Jef Verelst, who worked in Europe, served as Vice President of European Operations. Pallagi Decl. at ¶ 10.

Kevin Quinn, a Senior Vice President of OE Sales for Remy International, signed and delivered documents memorializing Complainant’s termination to Complainant in Hungary on July 7, 2014. Pallagi Decl. at ¶ 30, Ex. F. Prior to Complainant’s termination, in January 2014, Complainant submitted an investigation summary to Mr. Pallagi. *Id.* at ¶¶ 14, 21-27, Ex. D. In that investigation summary, Complainant addressed if quality metrics for manufactured parts were reported inaccurately at Remy HU; the investigation summary concluded that “gross misconduct” could not be substantiated and “[r]easonable belief about fraud or any other action knowingly aimed at generating a loss to, or harming the business interests of the company could not be established.” Pallagi Decl., Ex. D at 1.

VI. Applicable law and analysis

Motion for failure to state a claim upon which relief can be granted

Procedures for addressing SOX complaints within the Department of Labor are set forth in 29 C.F.R. Part 1980. The OALJ rules of practice and procedure for proceedings are set forth at 29 C.F.R. Part 18, Subpart A, and apply to SOX complaints. § 1980.107(a). These procedures state: “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.” § 18.10(a).

The Federal Rules of Civil Procedure (“Fed. R. Civ. P.”) permit a party to assert its defense to a matter in multiple ways, including by moving for dismissal based on the opponent’s failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The

⁵ Complainant’s Declaration is attached to his Opposition.

Administrative Review Board (“Board” or “ARB”) has recognized that it is an appropriate mechanism for a respondent to seek dismissal. *Neuer v. Bessellieu*, ARB No. 07-036 (ARB Aug. 31, 2009), slip op. at 4 n.17; *Powers v. PACE*, ARB No. 04-111 (ARB Aug. 31, 2007), slip op. at 8-9; *Villanueva v. Core Labs. NV*, ARB No. 09-108 (ARB Dec. 22, 2011), slip op. at 14 n.27. *But see Sylvester v. Parexel Int’l LLC*, ARB No. 07-123 (ARB May 25, 2011), slip op. at 12-13 (Rule 12 motions challenging sufficiency of pleadings are “highly disfavored” by SOX regulations; such complaints require further analysis pursuant to the OALJ rules governing summary decision or an evidentiary hearing on the merits).

In *Neuer*, the Board set out the standard for assessing Fed. R. Civ. P. 12(b)(6) motions. It stated: “Under Fed. R. Civ. P. 12(b)(6), all reasonable inferences are made in the non-moving party’s favor. The burden is on the complainant to frame a complaint with “enough facts to state a claim to relief that is plausible on its face.” *Neuer*, slip op. at 4 (footnote omitted). 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, a complainant’s legal conclusions are not binding, 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).

After stating in *Sylvester* that Fed. R. Civ. P. 12 motions (such as motions under 12(b)(6)) are disfavored in SOX cases, and instructing that dismissal motions require further analysis under the standard for summary decision, the Board decided *Villanueva*. In that case, the Board construed the administrative law judge’s action as a dismissal based on Fed. R. Civ. P. 12(b)(6), and then upheld his dismissal of the complaint. *Villanueva*, slip op. at 14, n.27. As will be discussed in more detail below, the issue in *Villanueva* involved the extraterritorial reach of § 806 of SOX.

Effective June 18, 2015, the OALJ rules of practice and procedure were revised to comport with the Fed. R. Civ. P. directives. 80 Fed. Reg. 28,767 (May 19, 2015) (codified at 29 C.F.R. Part 18, Subpart A) (effective Jun. 18, 2015). Those rules of practice and procedure now allow for motions to dismiss for failure to state a claim. *See* 29 C.F.R. § 18.70(c).

Based on the Board’s action in *Villanueva*, 29 C.F.R. § 18.70(c) is an appropriate vehicle to address the extraterritorial nature of a complaint under SOX § 806. Therefore, Respondent’s Motion for Summary Decision will be construed as a motion to dismiss for failure to state a claim upon which relief can be granted, rather than a motion for summary decision.⁶ Consequently, it is unnecessary to address the alternate bases motion for summary decision under 29 C.F.R. § 18.72 outlined in Respondent’s Motion.

⁶ As discussed above, all reasonable inferences will be made in Complainant’s favor as the non-moving party, just as would be the case in addressing a motion for summary decision under 29 C.F.R. § 18.72. *See, e.g., Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970) (noting that a party moving for summary judgment has burden of showing absence of genuine issue of material fact; therefore, all evidence and inferences must be viewed in light most favorable to opposing party); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (stating that when ruling on a motion for summary judgment, the “evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.”).

Section 806 and its requirements

The whistleblower protection provision of SOX, i.e., § 806, is codified at 18 U.S.C. § 1514A. It protects employees of publicly traded companies (companies with securities registered under § 12 of the Securities Exchange Act of 1934, or those required to file reports under § 15(d) of that statute) from adverse action related to the employee's protected activity. Protected activity is defined in § 806 as providing information that the employee "reasonably believes constitutes a violation" of Title 18, Sections 1341, 1343, 1344, or 1348 of the United States Code;⁷ any rule or regulation of the Securities and Exchange Commission; or any provision of Federal law relating to fraud against shareholders. § 806(a)(1). Section 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203 (2010), amended 18 U.S.C. § 1514A(a) by inserting the words "including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company" to the definition of companies covered in SOX § 806. Thus, as of the effective date of Dodd-Frank, July 21, 2010, employees of subsidiaries of publicly traded companies are covered under the whistleblower protection provisions of the SOX.

A complainant in a SOX case must establish the following elements by a preponderance of evidence: he engaged in protected activity, as defined in § 806; his employer knew he engaged in protected activity; he suffered an adverse action related to his employment; the protected activity was a contributing factor in the adverse action. *Getman v. Southwest Sec., Inc.*, ARB No. 04-059 (ARB Jul. 29, 2005). In *Villanueva*, a case Respondent cites as dispositive in the instant matter, the Board held that SOX § 806 is not extraterritorial in its scope; consequently, it affirmed an administrative law judge's dismissal of a SOX complaint. *Villanueva*, slip op. at 14.

Extraterritorial application of Section 806 is impermissible

In *Villanueva*, the Board performed a textual analysis of § 806 of SOX, in light of the U.S. Supreme Court case, *Morrison v. Austral. Nat'l Bank Ltd.*, 561 U.S. 247 (2010). *Villanueva*, slip op. at 8-12. The Board concluded: "Section 806(a)(1)'s silence as to its extraterritorial application requires that we not extend it in that way. Thus we hold that Section 806(a) does not allow for its extraterritorial application." *Id.*, slip op. at 12. The Board then applied its holding to the facts in *Villanueva's* case. *Villanueva* asserted that SOX § 806 need not be applied extraterritorially in his case because executives of the parent U.S. company directed the fraudulent conduct and also imposed adverse action against him. The Board found that "these arguments would not obviate applying Section 806(a)(1) extraterritorially." *Id.* It noted that the alleged fraud of which *Villanueva* complained involved "actions affecting foreign companies doing business in a foreign country, and a failure to comply with foreign tax law." *Id.*, slip op. at 13. The Board also stated that the fact that *Villanueva* reported alleged misconduct to officials of the parent company in the United States, or that they responded to his inquiries, did not change the foreign nature of the activities about which *Villanueva* complained. *Id.* And the Board reiterated that, in his allegations of fraudulent conduct, *Villanueva* did not assert any fraud involving U.S. law. *Id.*

⁷ These provisions relate to mail fraud, wire fraud, bank fraud, and securities fraud.

In a footnote, the Board stated that in assessing if a complainant's complaint would require extraterritorial application of § 806, among the factors to consider would be location of the protected activity; location of the job and the company employing the complainant; location of the retaliatory act; and the "nationality" of the laws allegedly violated that the complainant has been fired for reporting. *Id.*, slip op. at 10 n.22. It noted that the ALJ determined that the "principal parts" of Villanueva's case were extraterritorial, even though there may have also been components that were domestic. The Board emphasized that its decision was based on its conclusion that the "driving force of the case" – the activity being reported – was "solely extraterritorial and takes the events outside Section 806's scope." *Id.*

In *Morrison*, the Supreme Court considered the question of the extraterritorial application of the SEC anti-fraud laws. 561 U.S. 247 (2010). Specifically, the Court decided if 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.

In *Morrison*, 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 if a securities law has extraterritorial effect. *Id.* at 256-61.

The first step in the Court’s analysis asked if 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.⁸ *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.

Thus, the Court applied the presumption against extraterritoriality to the statutory language of Section 10(b) and Rule 10b-5. *Id.* 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 Second Circuit Court of Appeals held 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. at 3 (2d Cir. 2013). It 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 such an “argument inverts the ordinary canons of statutory interpretation.” *Id.*

Complainant contends that extraterritorial application of the SOX whistleblower provision appropriate in this case, citing ‘conduct and effects’ test as applied in *O’Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008). Complainant argues that Complainant’s

⁸ The overruled “conducts-and-effects” test asked: 1) if the wrongful conduct had a substantial effect in the United States or upon United States citizens; and 2) if 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*, 561 U.S. at 257-61.

reliance on *O'Mahony* is misplaced as the 'conduct and effects' test was squarely rejected by the Supreme Court in *Morrison* as discussed above. As Respondent noted in its Brief, "the ARB's *Villanueva* decision, following *Morrison*, not *O'Mahony*, established the four-factor analysis which controls –and disposes of – this case." Respondent's Brief at 6. It is well-settled that whistleblower provision of SOX is not intended to apply extraterritorially. The Board has held that extraterritorial conduct is outside the reach of Section 806. *Villanueva*, ARB No. 09-108, ALJ No. 2009-SOX-00006 (ARB Dec. 22, 2011); *accord 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).

Complainant's allegations fail to support domestic application of Section 806

The question then remains in this case: do the facts as Complainant has alleged in this matter invoke a domestic application of SOX § 806.

The 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, Complainant must establish his connection to this initial focus. It is undisputed that Remy International is a publicly held corporation incorporated in the United States and listing its shares on the NASDAQ. Pallagi Decl. at ¶4.

However, as the ALJ noted in *Blanchard*:

[M]ere corporate presence in the United States and participation in the [New York Stock Exchange] 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.

Blanchard v. Exelis Systems Corp., 2014-SOX-00020, at 21 (ALJ Jan. 20, 2015) (applying *Morrison*, 561 U.S. 247).

In his complaint to OSHA received on December 8, 2014, Complainant alleged he was "discharged because he reported multiple concerns of corporate actions that he reasonably believed violated SEC rules and involved shareholder fraud" and enumerated the following "violations" he "called to his employer's attention":

- Use of a "split-salary" compensation scheme that reduced the amount of gross compensation paid to Respondent's executives in Europe
- Use of overtime hours to provide employee bonuses in Hungary, circumventing Hungarian labor laws

- Inflation of Hungarian sales figures in violation of “local accounting rules”
- Underreporting in Remy Hungary of safety problems with refurbished heavy machinery sold to clients.

Complainant’s complaint to OSHA contends that the alleged split salary scheme, the bonus payments and inflated sales figures contravened non-United States laws. Complainant alleged misconduct by Remy Hungary in Hungary i.e., he maintained that the bonus payment violated Hungarian labor laws and inflated sales figures violated local (i.e., Hungarian) accounting practices. In his Opposition, Complainant maintains that he reported “Belgian tax laws were knowingly violated by Remy’s European subsidiaries” to various Remy International management officials in the United States and Europe. Complainant’s Opposition at 6; *see also* OSHA Complaint at 2-3.

In his declaration attached to his Opposition to Respondent’s Motion, Complainant maintains that he reported the payment of “black income” in violation of Belgian tax law to top executives of Remy in Europe and the “inflated sales figures of Remy Europe” to Mr. Pallagi in the U.S., as well as to Jef Verelest.⁹ Complainant’s Decl. at 2, ¶¶11-13. Mr. Pallagi, in his declaration, disputes that Complainant reported any allegations of “fraudulent safety reporting practices” to him. Pallagi Decl. at ¶¶ 11-12. However, all material factual disputes must be construed in Complainant’s favor for the purposes of this summary disposition. Therefore, Complainant’s allegations as outlined in his OSHA complaint and his declaration accompanying his Opposition to Respondent’s Motion for Summary Decision are credited as true.

In view of all relevant circumstances in their entirety, Complainant’s nexus to the United States is weak. Complainant is a Hungarian citizen who, during the relevant period, worked in Hungary for Respondent. Complainant’s mere reporting to a corporate officer in the United States alone is insufficient: the “location” of the “labor elements of Complainant’s whistleblower complaint is overwhelmingly” outside of the United States. *See Blanchard v. Exelis Systems Corp.*, 2014-SOX-00020 (ALJ Jan. 20, 2015) at 23-24; *see also Nielsen v. AECOM Technology Corp.*, 2012-SOX-00013 (ALJ May 24, 2012).

The location of the allegedly illegal conduct occurred outside of the United States – in Hungary or Belgium. Complainant’s discovery of such conduct also occurred outside of the United States. Complainant’s efforts to address the illegal conduct involved reporting it to Remy International management in Europe (i.e., Mr. Verelest) as well as in the United States, i.e., Mr. Pallagi. While Respondent disputes such reporting to Mr. Pallagi, Complainant’s assertions about reporting his allegations of illegal conduct to Mr. Pallagi must be credited for the purposes of this summary disposition. However, Complainant’s reporting of illegal conduct to Mr. Pallagi alone is insufficient to render the application of SOX § 806 to be domestic rather than extraterritorial. As the Board noted in *Villanueva*, reporting of alleged fraud to United States management officials failed to negate the extraterritorial nature of Villaneuva’s claim. *Villaneuva*, ARB No. 09-108, ALJ No. 2009-SOX-00006, slip op. at 13 (ARB Dec. 22, 2011)

⁹ As noted in Respondent’s Reply, Complainant does not further address the allegation of fraudulent safety reporting practices raised in his Opposition. Respondent’s Reply at 5, n.2.

(“The fact that Villanueva reported the alleged misconduct to Core Labs officials in Houston, or that they responded to his inquiries does not change the foreign nature of the alleged fraud.”). Lastly, the alleged retaliatory action, i.e., Complainant’s termination, occurred in Hungary: Mr. Quinn signed and delivered Complainant’s termination notice to Complainant in Hungary.

Complainant’s employment contract states that it was “entered into by and between” Remy Hungary and Complainant. Pallagi’s Decl., Ex. C at 1. Nonetheless, Complainant asserts that he was employed by Remy International, and not Remy Hungary, citing, in part, his reporting to Mr. Pallagi. Complainant’s Declaration at ¶¶ 3-4; 6-10. Mr. Pallagi maintains Complainant “was hired by Remy Hungary to perform the duties of Director of Human Resources for European Operations” and that “all Remy subsidiary Human Resources Directors reported to [him] organizationally,” but “operationally on a dotted line basis to their respective companies’ top executives.” Pallagi Decl. at ¶¶ 8; 10. Even assuming Complainant’s assertion as to his employment with Remy International rather than Remy Hungary were true, it is as Respondent states in its Brief, “immaterial in light of the undisputed facts that [Complainant’s] allegations were limited to violations of *foreign law* by Remy’s *European operations*.” Respondent’s Brief at 14 (emphasis in original text).

VII. Conclusion

SOX § 806 does not apply extraterritorially and Complainant has not stated a claim that warrants domestic application of the law under the applicable precedent of *Morrison*, *Liu Men-Lin*, and *Villanueva*. Therefore, granting Respondent’s dispositive motion is appropriate in this matter.

VIII. Order

Respondent’s Motion is **GRANTED** and this matter is **DISMISSED** with prejudice.

SO ORDERED.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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 should identify the legal 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).

When 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, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).